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Vulnerable Offenders: Domestic and Comparative Perspectives

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A written commentary submitted in partial fulfilment of the requirements of the University of Northumbria at Newcastle for the degree of Doctor of Philosophy by published work.

April 2016

For Nanna Mary

27.03.1930-29.04.2016

Declaration

I declare that no outputs submitted for this degree have been submitted for a research degree at any other institution. I also confirm that the work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this commentary has been approved. Approval has been sought and granted from the Faculty Ethics Committee on 22/03/2016.

I declare that the Word Count of this Commentary is 9926 words (excluding title pages, contents pages, acknowledgements, bibliography, and referencing)

Name: Nicola Wake

Date: 04 /04 /2016.

Signature:

Abstract

This work, published over a five-year-period, focuses upon the availability of mental condition defences to vulnerable offenders. The question addressed is ‘to what extent do mental condition defences adequately accommodate the circumstances of vulnerable offenders within the criminal justice system?’ The publications are timely in charting a pathway for the interpretation and application of the (then) recently introduced partial defences to murder, and recent reviews/reforms to mental condition defences across England and Wales (‘E&W’), Scotland, New South Wales (‘NSW’), Victoria, New Zealand (‘NZ’), and the United States (‘US’), before advancing optimal reform solutions. The publications fall under four themes, each addressing essential aims and objectives of the study. The overarching aim is to provide optimal reform solutions to problems faced by vulnerable offenders in claiming mental condition defences. The objective is to provide a critical exposition of these problems before advancing reform proposals based upon the experiences of the jurisdictions identified. The research method is largely doctrinal ‘black-letter’, comparative, and reform-focused. The nature of the research means that socio-legal factors also play a significant role.

This collection provides a leading point of reference in the field of mental condition defences, which represents one of the most important and sensitive criminal law areas; this work reveals significant problems in the operation and application of the law. The central conclusion reached is that in the context of mental condition defences, a rebalancing exercise must take place, which ensures vulnerable offenders are at the centre of discourse, policy, and reform initiatives. In this regard, these publications provide insights into the interpretation of proposed, new and existing law as it applies to vulnerable offenders. This focus upon making mental condition defences more accessible to the vulnerable offender, and the optimal reform framework advanced demonstrates the extent to which this can be achieved, without risking the integrity of mental condition defences; the NZ Law Commission is considering several of the proposals.

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Acknowledgements

I express my gratitude to the Centre for Evidence and Criminal Justice Studies (the ‘Centre’, Northumbria University), and the Institute of Criminology (the ‘Institute’, University of Sydney) for facilitating this research. I am also grateful to the Society of Legal Scholars for part-funding this research.

It is not possible to thank all of the wonderful individuals who have in some way influenced this body of work, whether through informal discussion, engaging in conferences, etc., but there are three key individuals to whom I owe special thanks:

I am indebted to Professor Alan Reed, my advisor, and the most positive, knowledgeable and supportive person I know. Alan always ensured my glass was half-full while I was working on this project; this is incredibly important when writing about the law on intoxication;

I thank my superb colleague, Dr Ray Arthur, my second advisor. Ray is not only excellent to work with, but he is always available to provide support and advice when I need it;

Thank you to Dr Arlie Loughnan, my sponsor and co-author to article (iii). Arlie made my Ross Parson’s Visiting Fellowship possible, and I have learned so much from working alongside Arlie in relation to the publication and related projects.

I thank my loving, caring and supportive parents, and sisters, Joanne and Paula.

In particular I owe a special thanks to my mam, my best friend, who, given the amount of times she needed to repeat, ‘you can do it, you always do!’, would likely be able to claim one of the defences referred to in this collection if it came to it.

Thank you to my Uncle Bob for reading every one of my publications, and still being interested enough to ask me questions about them.

Thanks to my grandad for his words of wisdom, and for repeatedly asking me, ‘are you not working? Isn’t it about time you got that PhD finished?’

Finally, I thank my caring and understanding partner, Steven, who loves to tell all of our friends, ‘she knows how to get away with murder.’

Introduction

This collection, published over a five-year-period, provides a leading point of reference in the field of mental condition defences. The law relating to mental condition defences is one of the most important and sensitive areas of the criminal law; this published work reveals significant problems in the operation and application of the law to vulnerable offenders. The publications are timely in charting a pathway for the interpretation and application of the (then) recently introduced partial defences to murder, and recent reviews and reforms to mental condition defences across E&W, Scotland, NSW, Victoria, NZ and the US ('key jurisdictions'), before advancing optimal reform solutions.

Impact

The research underpins the 'Vulnerable Suspects and Offenders Impact Case Study', which will be submitted under the Research Excellence Framework (REF) 2021 exercise.¹ Publications (i)-(ii), (v)-(vi), and (viii) were reviewed and submitted under REF 2014.² The remaining publications form part of a REF 2021 selection. Northumbria Law School was the most improved law school in the UK in terms of internationally recognised research provision; half of all research outputs in law were assessed as either world leading or internationally excellent. The case study includes two Higher Education and Innovation Funded (HEIF) projects, focused on identifying recognised medical conditions in vulnerable offenders, and developing a conference programme between the Centre and the Institute. This initial link was generated through a conference organised by the author.³ The research has been presented at Sydney University, and national and inter-national conferences/events.⁴ HEIF funding was used to organise the 'Age of Criminal

¹ These edited collections include: *Mental Condition Defences and the Criminal Justice System; Perspectives from Law and Medicine* (Cambridge Scholars Publishing, 2015) (ISBN: 978-1-4438-7161-7); and, *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate Publishing, 2014) (ISBN: 978-1-4724-3335-0). Forthcoming edited collections in this area include: *Consent: Domestic and Comparative Perspectives* (Ashgate Publishing, 2016) (under contract); and, *Consent and Control; Legal Perspectives on State Power* (Cambridge Scholars Publishing, 2016) (under contract). Forthcoming special editions in this area include: 'The Age of Criminal Responsibility; Domestic, International and Comparative Perspectives' (2016) Northern Ireland Legal Quarterly; and, 'Criminal Justice and Society' (2016) Journal of International and Comparative Law.

² Four publications were submitted to the REF exercise by this author, and one was submitted by a co-author. A number of publications written or co-authored by this author, relating to the theme of this collection, but not contained within the main body of the work are provided within the appendices.

³ Mental Disorder and Criminal Justice (Northumbria University, 2013).

⁴ Selected conferences and events include: Nicola Wake, 'Responding to the NZ Law Commission: A New Partial Defence (for primary victims)?' (De Montfort University, 2016); Nicola Wake, 'Loss of Con-

Responsibility' conference 2015, which immediately preceded Lord Dholakia's 'Age of Criminal Responsibility Bill', and was timed to coincide with (and respond to) the government's recent announcement it will review the youth justice system in E&W.⁵ Several institutions have contacted the organisers to express an interest in collaborating. The work undertaken has been cited extensively by academics⁶, the Law Commission⁷, website users⁸ press reports,⁹ and has supported successful funding applications.¹⁰ The au-

trol and Extreme Provocation; Anglo-Australian Perspectives' (University of Sydney Institute of Criminology, 2015); Nicola Wake and Natalie Wortley, 'Principal aggressors and primary victims: The inadequacy of extreme provocation and loss of control' (Fighting Femicide: Cultural and Legal Interventions, Queen Mary University, 2015); Nicola Wake, 'Partial Defences and Primary Victims; Anglo-Australian Perspectives' (IALMH, Sigmund Freud University, Vienna, 2015); and, Nicola Wake and Natalie Wortley, 'The Coroners and Justice Act 2009; Then and Now' (The Royal College of Psychiatrists Thirteenth Annual Grange Conference, 2014).

⁵ Details regarding the conference, speakers and papers are available via the following link: <http://newsroom.northumbria.ac.uk/events/the-age-of-criminal-responsibility-acr-conference-55837>. The Age of Criminal Responsibility Bill is available: <<http://services.parliament.uk/bills/2015-16/ageofcriminalresponsibility.html>> accessed 2 February 2016. The Ministry of Justice Interim Report, *Review of the Youth Justice System* (MoJ IR, 2015) for the Youth Justice Review is available via the following link: <<https://www.gov.uk/government/news/review-of-the-youth-justice-system>> accessed 2 February 2016.

⁶ See, for example, Arlie Loughnan, 'From Carpetbag to Crucible: Reconceptualising Diminished Responsibility Manslaughter' in *Mental Condition Defences and the Criminal Justice System* (Cambridge Scholars publishing, 2014); Thom Brooks, 'Involuntary intoxication; a new six-step procedure' *Journal of Criminal Law* 2015, 79(2), 138-146; Kate Fitz-Gibbon, *Homicide Law Reform and the Provocation Defence: A Comparative Perspective* (Palgrave, 2015); David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (Oxford University Press, 2013); John Child and David Ormerod, *Smith and Hogan's Essentials of Criminal Law* (Oxford University Press, 2015); Jonathan Herring, *Great Debates in Criminal Law* (Palgrave Publishing, 2015); Jonathan Herring, *Criminal Law: Texts Cases and Materials* (Oxford University Press, 2014); Nicola Padfield, *Criminal Law* (Oxford University Press, 2014); AP Simester, JR Spencer, GR Sullivan and JG Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 2013); and, Andrew Ashworth, 'Homicide: Coroners and Justice Act 2009 s.54 - loss of control - qualifying trigger' *Criminal Law Review* [2012] 7, 539-544; Amanda Clough, 'Mercy Killing: Three's a crowd' *Journal of Criminal Law* (2015) 79(5), 358-372; Tony Storey and Natalie Wortley, 'More than merely more than minimal: the meaning of the term "substantial" in the context of diminished responsibility' (2014) *Journal of Criminal Law* 78(5), 373-378; Tony Storey, 'Loss of control: sufficient evidence' (2015) *Journal of Criminal Law* 79(1), 6-8 (note); Adam Jackson and Natalie Wortley, 'Loss of control and the "normal" person: the relevance of self-induced intoxication' (2013) *Journal of Criminal Law* 77(4), 292-295 (note); Natalie Wortley 'Reasonable belief in consent under the Sexual Offences Act 2003' (2013) *Journal of Criminal Law* 77(3), 184-188 (note); Chris Morgan, 'Loss of self-control: Back to the good old days' (2013) *Journal of Criminal Law* 77(2), 119-135; Amanda Clough, 'Sexual infidelity; the exclusion never was?' (2012) *Journal of Criminal Law* 76(5), 382-388; Matt Gibson, 'Intoxicants and Diminished Responsibility: the impact of the coroners and justice act 2009' [2011] *Criminal Law Review* 12, 909-924.

⁷ Law Commission Discussion Paper, *Insanity and Automatism* (Law Com DP, 2013). See, Adam Jackson, Natalie Wortley and Nicola Wake, 'Insanity and Automatism: A Response to the Law Commission Part 2' (2012) *Criminal Law and Justice Weekly*, 176, 51/52, 752-754 (ISSN: 1759-7943); Adam Jackson, Natalie Wortley and Nicola Wake, 'Insanity and Automatism: A Response to the Law Commission Part 1' *Criminal Law and Justice Weekly* (2012) 176, 50, 731-733 (ISSN: 1759-7943). Please see Appendix A for these publications.

⁸ Available: <<http://www.aic.gov.au/library/alerts/homicide/201401.html>> accessed 11 January 2016; Available: <<http://news.sclqld.org.au/Newsletter/display.php?List=4&N=68#>> accessed 11 January 2016.

⁹ Selected reports include: North News, 'UK Youth Justice-Out of Step and Unacceptable' available at: <<http://newsroom.northumbria.ac.uk/pressreleases/uk-youth-justice-out-of-step-and-unacceptable-1223258>> accessed 14 October 2015; Your Psychology, Medical News Today, and Web4Professionals

thor is first supervisor to a PhD student and second supervisor to two university-funded PhD students researching in this area. Several posited reform options are currently under consideration by the New Zealand Law Commission.¹¹

Advancement of the field of study

A new approach to the issue of mental condition defences that suggests *a rebalancing exercise must take place, ensuring vulnerable offenders are at the centre of discourse, policy initiatives, and reform in relation to this sensitive area of the criminal law* is the central premise of these publications.¹² This *prima facie* controversial approach to mental condition defences provides an original focus on the impact of the law on vulnerable offenders. It is common for discourse to focus on vulnerable victims or witnesses;¹³ victims are by definition a vulnerable category of individual; the witness to a crime might be regarded vulnerable; but it is rare to speak of vulnerable offenders. In many cases, the offender ought not to be considered vulnerable, yet a number of offenders are vulnerable. This collection focuses upon offenders vulnerable by mental ill health and/or family violence.¹⁴ In creating mental condition defences, the law (and literature) recognises a need in vulnerable offenders, but the focus when reforming the law frequently

'Northumbria Legal Experts and Psychiatrists Grapple with Changes to the Law on Partial Defences'; Medical Net, 'Law experts, psychiatrists discuss legal changes affect evidence in murder cases' available: < Available: <<http://www.news-medical.net/news/20141008/Law-experts-psychiatrists-discuss-legal-changes-affect-evidence-in-murder-cases.aspx>> accessed 18 August 2015;

Times North, 'Top QC Says Law on Mental Health Needs to Be Clarified' available: <<http://timesnorth.org/2014/10/09/top-qc-says-law-on-mental-health-needs-to-be-clarified/>> accessed 18 August 2015; Psys.org 'Changing perceptions of mental disorder'; Available at: <<http://phys.org/news/2013-10-legal-perceptions-mental-disorders-defendants.html>> accessed 18 August 2015.

¹⁰ Selected applications include: Society of Legal Scholars Research Activities Fund (SLS, £1,000); HEIF Impact Fund (£2,700, and £1,500); Modern Law Review seminar series fund (£5,000); Mental Disorder and Criminal Justice Research Conference (University of Sunderland, £1,500); and the Northumberland NHS Trust Tyne and Wear (£299).

¹¹ New Zealand Law Commission Issues Paper, *Victims of Family Violence Who Commit Homicide* (NZ Law Com IP 39, 2015). The full response is available in Appendix F.

¹² For example, Cairns discusses feminising provocation for the purposes of assisting those who respond to family abuse with lethal force to claim an appropriate defence; Ilona CM Cairns, 'Feminising' provocation in Scotland: the expansion dilemma' (2014) *Juridical Review* 4, 237-261.

¹³ See generally, The Crown Prosecution Service, *Victims and Witnesses* (CPS) available: <http://www.cps.gov.uk/victims_witnesses/> accessed 14 October 2015.

¹⁴ This is clearly not an exhaustive list of the categories of offender who might be regarded as vulnerable within the criminal justice system. This collection does briefly consider additional categories of offender who are vulnerable by virtue of youth, given the particularly low level of criminal responsibility operating in E&W, and 'offenders' who, though not the victim of family violence, are vulnerable because they have been subject to attack, for example, householders who act to defend themselves from an intruder. For an analysis of the nature of family violence see, Thom Brooks, *Punishment* (Routledge, 2012) ch 10, and Jennifer Youngs, 'Family violence and the criminal law: reconceptualising reform' (2015) *Journal of Criminal Law* 79(1), 55-70.

shifts to inappropriate claims, and the 'bad' offender. For example, emphasis on the primary victim is often used to highlight gender bias in provocation, and to lobby for abolition.¹⁵ Extensive debate regarding the exclusion of mental condition defences often results in restrictive proposals/reforms that preclude the defence in genuine cases. Preventing unmeritorious claims is fundamentally important, but vulnerable offenders should be adequately accommodated.¹⁶ The explicit focus on vulnerable offenders renders this collection an original point of reference for researchers, members of the legal profession and law reformers. The work demonstrates how a shift in emphasis would ensure vulnerable offenders have access to defences without risking their abuse; reform recommendations are advanced in this regard.

Methodology

The research is largely doctrinal 'black-letter'¹⁷, comparative, and reform-focused. The nature of the research means that socio-legal factors also play a significant role. The research utilises primary sources: legislation and case-law from hard copy held in Northumbria and Sydney University libraries, and electronically via Westlaw, Lexis Nexis, Heinonline, BaiLII, NZLII, and AustLII; and, secondary material drawn from library collections, inter-library loans, the identified databases, and official websites.¹⁸ This inductive, qualitative methodology engages in 'ascertaining the precise state of the law on a particular point', and exploring the 'implications of the state of the current law',¹⁹ providing a 'more useful understanding' of the present law and its operation.²⁰

¹⁵ See, Adrian Howe, 'Provocation in crisis-Law's passion at the crossroads? New directions for feminist strategists' (2004) *The Australian Feminist Law Journal* (21).

¹⁶ Simon Parsons, 'The loss of control defence-fit for purpose?' (2015) *Journal of Criminal Law* 79(2), 94-101.

¹⁷ See, Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2010) 3-4.

¹⁸ For example, <<http://www.parliament.uk>>, <<https://www.gov.uk>>, <<http://www.parliament.vic.gov.au>>, <<http://www.scotlawcom.gov.uk>>, <<http://www.parliament.nsw.gov.au>>, <<http://www.lawreform.justice.nsw.gov.au>>, <<http://lawcommission.justice.gov.uk>>, <<http://www.lawcom.govt.nz>>, and <<http://www.lawreform.vic.gov.au>>.

¹⁹ Glanville Williams, *Learning the Law* (Sweet and Maxwell, 2002) 206-7.

²⁰ D Ezzy, *Qualitative Analysis: Practice and Innovation* (Allen and Unwin, 2002) 5. See, positivist legal theory advanced by HLA Hart, *The Concept of Law* (2012, Oxford University Press).

A comparative approach provides 'suggestions for future development', 'warnings of possible difficulties', and critical exposition of the national system.²¹ Despite the difficulties attendant to policy transfer, considered further below, the experience of other jurisdictions allows for advancement of reform solutions based upon tried and tested methods.²² NSW, Victoria, Scotland, NZ, and the US have attempted to address problems inherent within mental condition defences. As part of the Commonwealth (barring the US, considered below), these jurisdictions provide a useful point for comparison.

Of the six Australian states, the law in NSW, Victoria, and South Australia remains common-law based, rendering them apt for comparison with E&W.²³ The focus is on the law in NSW and Victoria where significant reform to the partial defences has taken place. South Australia recently joined the provocation debate.²⁴ The Criminal Law Consolidation Act (Amendment) Bill 2013 designed to prevent same-sex advancements from founding a basis for the defence was rejected in 2014, but reintroduced last year post the controversial *Lindsay*²⁵ case, where the High Court ruled the defence should be left to the jury where D killed in response to an unwanted homosexual advance. Given South Australia's recent entry into the debate, limited reference is made to the state.²⁶

Scotland reviewed the defences of diminished responsibility, provocation and insanity at the time that the partial defences were reviewed in E&W. Diminished responsibility

²¹ Geoffrey Wilson, 'Comparative Legal Scholarship' in *Research Methods for Law* (Edinburgh University Press, 2010) 89. See, R Sacco, *Legal Formats: A Dynamic Approach to Comparative Law* (1991) 39 *American Journal of Comparative Law* 1.

²² 'The method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who has corralled in his own system'; K Zweigert and H Kotz, *An Introduction to Comparative Law* (Oxford University Press, 2011) 15.

²³ The law in Queensland, Tasmania, and Western Australia has been codified. There are also ten Australian territories outside the borders of the states.. Two mainland territories (the Australian Capital Territory (ACT), and, the Northern Territory (NT)) and one offshore territory (Norfolk Island) have been provided limited rights of self-government by federal government. Given the population of the ACT and the NT, they are often treated as though they are independent states. Nevertheless, they have been excluded from evaluation because they are not governed by Commonwealth law. The other territories are governed by the Commonwealth law, but are significantly smaller in size to the states, and, as such, the states identified remain the focal point of the research. For further information see: [australia.gov.au:<http://www.australia.gov.au/about-government/how-government-works/state-and-territory-government>](http://www.australia.gov.au/about-government/how-government-works/state-and-territory-government) accessed 22 March 2016.

²⁴ Fitz-Gibbon (n 6).

²⁵ [2015] HCA 16 (6 May 2015).

²⁶ The position in South Australia will form the basis of a future publication.

originated in Scotland, before adoption in England.²⁷ In Scotland, provocation may be based upon a violent act or sexual infidelity.²⁸ The difference between the Scottish position and English law where sexual infidelity is excluded as a qualifying trigger allows for an assessment of the efficacy of automatic exclusion.²⁹ During this period of review, NZ elected to abolish provocation, and is now assessing whether to reintroduce a partial defence.³⁰ The abolition of the defence shortly after the introduction of the loss of control defence allows for an assessment of the ramifications of abolition, given the E&W Law Commission identified that support for the partial defences would be reduced should the mandatory life sentence be repudiated.³¹

The US is not part of the Commonwealth, but remains an apt comparator due to its common-law basis.³² Rather than codification of the law as has occurred in many continental jurisdictions, the 'Anglo-American Legal Family' evolved through a mutual interest in precedents and case law.³³ Each State represents an independent authority, resulting in several common-law provocation variants. A caveat applies in that consideration is given to the extreme mental and emotional disturbance defence ('EMED') operating in MPC Reform States.³⁴ The E&W Law Commission considered the MPC 'provocation equivalent' as a reform option.³⁵ Assessment of the partial defences rightly includes this comparator. Comparative analysis divides the US approach into 'Traditional Reform States' and 'MPC Reform States'.

The predominant focus of comparison is on common-law rather than civil law systems (excepting the hybrid system in Scotland and the MPC EMED defence). The reason for this approach is two-fold: as the research has progressed, relevant Law Commissions

²⁷ James Chalmers, 'Partial Defences to Murder in Scotland' in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2011) 167-182.

²⁸ *ibid.*

²⁹ See, Clinton [2012] EWCA Crim 2. See also, (v).

³⁰ See, Crimes Provocation Amendment Act 2009 No 64 s4 (7 December 2009) (NZ). Abolition of the partial defence meant that any *de facto* form of diminished responsibility that existed was also abolished; Warren Brookbanks, 'Partial Defences to Murder in New Zealand' in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2011) Chapter 14.

³¹ Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) paras 5.12-5.14. Although cf. paras 1.7-1.9 in relation to the provocation defence.

³² See generally, Paul H Robinson, 'Murder, Mitigation in the Fifty Two American Jurisdictions: A Case Study in Doctrinal Interrelation Analysis' (2014) 47 Texas Tech Law Review 19.

³³ Zweigert and Kotz (n 22) 181.

³⁴ American Law Institute, *Model Penal Code* (1981) §210.3 (1) (b).

³⁵ Law Com No 290, 2004 (n 31).

have utilised these jurisdictions as comparators, providing critical observations on the law in E&W; and, a common-law focus renders it possible to consider more jurisdictions. A comparison between civil and common-law requires a different approach to materials, methodologies, and organisational/procedural issues.³⁶ Civil law systems rely on codes and legislation, necessitating an assessment of treatises and commentaries in preference to case law.³⁷ Absent of the rule of precedent and *stare decisis*, judicial decisions are not the binding authority they represent in common-law.³⁸ The judge in civil cases has greater discretion than a common-law judge who is bound by common-law authority.³⁹

The demarcation between black-letter doctrinal analysis and socio-legal study is not always an obvious one.⁴⁰ Comparative research is ‘rightly affected by non-legal factors’,⁴¹ such as, operational contexts.⁴² A systematic approach is required to identify political, cultural and social factors impacting legal developments.⁴³ The selected jurisdictions categorise homicide in different ways; some have no mandatory life sentence, allowing for sentencing discretion (although sentencing presumptions may impact on that discretion);⁴⁴ others have abolished partial defences.⁴⁵ In terms of relevant political, cultural and social factors, an in-depth analysis of individual responses to public consultations published through Parliamentary and Law Commission websites was undertaken.⁴⁶ Accessing newspaper articles, and discussions with relevant contacts supplemented this

³⁶ Joseph Dainow, ‘The Civil Law and the Common-law: Some Points of Comparison’ (1966-7) *The American Journal of Comparative Law* 15 (3), 419-435.

³⁷ *ibid* 430.

³⁸ *ibid*.

³⁹ *ibid*.

⁴⁰ A feminist legal approach is outside the parameters of this particular collection. The research does include some gender issues, particularly in the context of family violence, but the focus is not limited to women who kill their abusers. Primary victims are identified as a vulnerable category of offender, and the term is applicable to both sexes. The study is broader than the focus adopted in feminist legal research with its emphasis on how existing legal concepts have the potential to disadvantage women. This study explores the extent to which the law relating to mental condition defences has the potential to disadvantage vulnerable offenders. See, Howe (n 15).

⁴¹ Wilson (n 21) 93.

⁴² Zweigert and Kotz (n 22).

⁴³ Caroline Morris and Cian Murphy, *Getting a PhD in Law* (2011, Hart Publishing) 37. Discussions with national and international experts have assisted the research, providing access to material in draft form or in working papers, in addition to providing clarification on issues. This dialogue resulted in collaborative mental condition defences projects, several forming the basis of these publications. As a Ross Parson’s Visiting Fellow, the author was able to liaise with personal contacts, and access materials available via the University of Sydney library.

⁴⁴ NZ Law Com IP 39, 2015 (n 11) 117.

⁴⁵ New Zealand and Victoria have abolished all general partial defences; see Parts Three and Four.

⁴⁶ See, generally, M Van Hoecke, *Legal Doctrine: Which Method(s) for What Kind Of Discipline* (Hart Publishing, 2011).

understanding. It is also essential to consider aspects of psychology and psychiatry to appreciate how medical conditions ‘fit’ the legislation. This interdisciplinary approach to researching mental condition defences is vital to advance workable reform options. The research is ultimately reform-focused; by considering divergent approaches to similar problems, it is possible to assess the effectiveness of diverse legal frameworks in responding to vulnerable offenders. This methodology contributes to understanding of the law within E&W, and assists in identifying avenues for future reform.⁴⁷

Literature review

The publications draw on a number of different sources, as referenced and cited throughout the publications. Official governmental reports⁴⁸, parliamentary debates⁴⁹, and Law Commission reports⁵⁰ across the jurisdictions identified have been utilised extensively. The author also read a number of submissions to Committee,⁵¹ Governmental and Law Commission consultations⁵², and hansard debates, that were not included in final reports.⁵³ The original analysis of these responses provides a valuable insight into key stakeholder concerns, providing alternative views to the ones supported by the Commission and governmental bodies.

In many cases the stated focus of the relevant Law Commissions,⁵⁴ government⁵⁵ and other organisations⁵⁶ is on vulnerable offenders, but that focus often becomes blurred.

⁴⁷ Wilson (n 21) 92.

⁴⁸ See, for example, Ministry of Justice Consultation Paper, *Murder, Manslaughter and Infanticide: Proposals for reform of the law* (MoJ CP, 19/08, 2008); NSW Legislative Council, *Select Committee on the Partial Defence of Provocation* (NSWLC, 2013); Victorian Department of Justice Consultation Paper, *Proposals for Legislative Reform* (VDoJ CP, 2013).

⁴⁹ See, for example, House of Commons, *Hansard Parliamentary Debates*, 4 March 2009 (HC Deb 4 March 2009) (E&W); and Legislative Council, *Hansard Parliamentary Debates: Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, second reading 7 August 2014 (LC Debates 2014) (Vic).

⁵⁰ Law Commission Consultation Paper, *Partial Defences to Murder* (Law Com CP, No 173, 2003); Law Com DP, 2013 (n 7); Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 306, 2006); Law Com No 290, 2004 (n 31); and, Law Commission, *Unfitness to Plead* (Law Com, 2010-2016) available: <<http://www.lawcom.gov.uk/project/unfitness-to-plead/>> accessed 28 January 2016.

⁵¹ See, for example, Gay and Lesbian Rights Lobby, ‘Ending an excuse for murder: Revisiting the partial defence of provocation in NSW’ (2013).

⁵² See, for example, Helen Gibbon, Alex Steel, Julie Stubbs and Courtney Young, ‘Submission to the NSW Government on the Exposure Draft Crimes Amendment (Provocation) Bill 2013’ (2013); WEL, ‘The Exposure Draft Crimes Amendment (Provocation) Bill 2013’ (2013).

⁵³ Legislative Assembly, *Hansard Parliamentary Debates: Crimes Amendment (Abolition of Defensive Homicide) Bill 2014*, second reading 3 September 2014 (LA Debates 2014) (Vic).

⁵⁴ See, for example, NZ Law Com IP 39, 2015 (n 11).

⁵⁵ In the context of householder cases, see, Chris Grayling, ‘A Tory government would seek to protect the rights of the victim’ *Telegraph* 19 December 2009. See also, *Collins* [2016] EWHC 33.

⁵⁶ Family Violence Death Review Committee, *Fourth Annual Report* (FVDRC, 2014).

For example, the NSW Parliament retained the controversial loss of self-control requirement and introduced a clause mandating the victim's conduct amount to a serious indictable offence before extreme provocation could be raised,⁵⁷ despite the NSW Select Committee's (the 'Committee') observation that loss of self-control disadvantages primary victims.⁵⁸ The NZ Law Commission's recent Issues Paper⁵⁹, which is limited to primary victims who commit homicide, to the exclusion of other vulnerable offenders in analogous situations, but for the familial link, provides another example.⁶⁰ This work is not limited by such terms of reference, and the focus is on optimal reform avenues.

The publications complement⁶¹ work published during the course of this research, for example, 'Mental Condition Defences and the Criminal Justice System; Perspectives from Law and Medicine';⁶² 'General Defences in Criminal Law: Domestic and Comparative Perspectives';⁶³ 'Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives';⁶⁴ 'Homicide law reform, gender and the provocation defence: A comparative perspective';⁶⁵ 'Mental Disorder and the Criminal Justice System'⁶⁶; and, 'Manifest Madness: Mental Incapacity in the Criminal Law'.⁶⁷ As indicated within the publications, other articles⁶⁸ and book chapters⁶⁹ focusing upon mental condition defences have informed this study.

The author also relies on case law,⁷⁰ and commentaries.⁷¹ Commentaries published

⁵⁷ Considered in (vii). Section 23 Crimes Act 1900, as amended by the Crimes Amendment (Provocation) Act 2014 (NSW).

⁵⁸ Considered in (v)-(ix). NSWLC, 2013 (n 48).

⁵⁹ NZ Law Com IP 39, 2015 (n 11).

⁶⁰ Considered in Appendix F.

⁶¹ The work is also included within key edited collections.

⁶² *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (n 1).

⁶³ *General Defences in Criminal Law: Domestic and Comparative Perspectives* (n 1).

⁶⁴ *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2011).

⁶⁵ Fitz-Gibbon (n 6).

⁶⁶ (2014) Northern Ireland Legal Quarterly 65(2).

⁶⁷ Arlie Loughnan, *Manifest Madness* (Oxford University Press, 2012).

⁶⁸ See, for example, Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' [2006] Current Issues in Criminal Justice 18(1) 51;

⁶⁹ Brookbanks (n 30).

⁷⁰ For example, *Asmelash* [2013] EWCA Crim 157; *Clinton* (n 29); *Dowds* [2012] EWCA Crim 281; *Golds* [2014] EWCA Crim 748; *Gurpinar and Kojo-Smith* [2015] EWCA Crim 178; *Majewski* [1977] AC 443; *O'Connor* (1980) 146 CLR 64; *Rihia* [2012] NZHC 6720; *Wihongi* [2012] 1 NZLR 755.

⁷¹ See, for example, Barry Mitchell and Ronnie Mackay, 'The Golds standard of substantial impairment' (2015) Archbold Review, 4, 7-9 (note); Rudi Fortson, 'R v Brennan (Michael James): manslaughter-diminished responsibility' [2015] Criminal Law Review 4, 290-294 (note); Jonathan Rogers, 'The

shortly after cases are decided are valuable in providing an important analysis of the law and related context; their currency means they can often be relied upon before articles are published, but they are limited in detail compared to articles because they are designed to provide an update.

Structure

There are nine publications. Labelled (i)-(ix), the publications are divided between four key themes, each addressing an essential aim of the study. These contributions form a coherent whole, connected by the overarching research question: ‘to what extent do mental condition defences adequately accommodate the circumstances of vulnerable offenders within the criminal justice system?’⁷² The objective is to provide a critical exposition of the problems vulnerable offenders face in claiming mental condition defences, before presenting future reform options predicated upon the experiences of the identified jurisdictions; to meet this overarching objective several secondary aims/objectives are outlined.

Parts One-Two consider the inter-relationship between intoxication and mental condition defences, focusing upon offenders vulnerable due to a recognised medical condition. Part One aims to investigate whether partial defences are capable of accommodating offenders with co-morbidity; the co-existence of mental illness and substance abuse. The objective is to provide an in-depth review of the application of partial defences to these offenders across key jurisdictions. A shift in focus from mental condition defence exclusion towards ensuring these defences are available is required. Amendments that would legislatively exclude voluntary intoxication from the parameters of the partial defences, prevent unnecessary litigation, and assist in dealing with offenders with co-morbidity are advanced. Predictions made regarding potential litigation were borne out in practice, and the optimal solutions for reform presented remain viable and beneficial in terms of future development. The publications include: (i) ‘Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed, and Something

amended diminished responsibility plea’ (2015) *Cambridge Law Journal* 74(2), 201-205 (note); and, Tony Storey, ‘Diminished responsibility: jury verdicts and ‘uncontradicted’ psychiatric evidence’ (2015) *Journal of Criminal Law* 79(1) 15-19 (note).

⁷² To this end, there are cross-references between the articles/chapters where appropriate.

New';⁷³ and, (ii) 'Recognising Acute Intoxication as Diminished Responsibility? A Comparative Analysis'.⁷⁴

Part Two aims to examine the availability of insanity and automatism to the same category of offender, with increased emphasis on the role of prior fault in precluding mental condition defences.⁷⁵ The objective is to critically analyse the interaction between prior fault doctrine and the insanity and automatism defences, making reference to key jurisdictions. Excluding the availability of defences based upon the offender's prior fault in becoming intoxicated renders it difficult to respond to offenders with co-morbidity. A model predicated on potentiate liability and applying *dépeçage* standardisations to individuated scenarios involving the intoxicated offender are advanced. A new offence of dangerous intoxication is proposed, in addition to recommendations, which would amend the current diminished responsibility defence. Revisions are suggested in relation to the Law Commission's proposals as they apply to medication non-compliance, in the context of the advanced 'recognised medical condition' defence.⁷⁶ The publications include: (iii) 'Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication',⁷⁷ and, (iv) 'Potentiate Liability and Preventing Fault Attribution; The Intoxicated "Offender" and Anglo-American *Dépeçage* Standardisations'.⁷⁸

Parts Three-Four focus upon offenders vulnerable due to family violence and/or physical attack. Part Three aims to scrutinise the availability of loss of control⁷⁹ to primary victims⁸⁰ who kill. The objective is to provide a detailed assessment of the application of the loss of control, provocation, extreme provocation, and (the former) defensive homicide defences as they apply to primary victims across key jurisdictions. Two reform models operate across these jurisdictions; the exclusionary and positive-restriction-based reform models. The current approach, which focuses upon restriction/exclusion at the expense of the vulnerable offender, is criticised and rejected.

⁷³ *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (n 64) 183-207.

⁷⁴ (2012) *Journal of Criminal Law* 76(1), 71-98.

⁷⁵ See, generally, Thom Brooks (eds) *Alcohol and Public Policy* (Routledge, 2015).

⁷⁶ Law Com DP, 2013 (n 7).

⁷⁷ *General Defences in Criminal Law: Domestic and Comparative Perspectives* (n 1) 365-405.

⁷⁸ (2014) *The John Marshall Law Review* 47(1) 57-113.

⁷⁹ And equivalent provisions across selected jurisdictions.

⁸⁰ The Family Violence Death Review Committee defines the primary victim as an individual experiencing 'ongoing coercive and controlling behaviour from their intimate partner'; (n 56).

An interim reform measure, which would introduce a ‘social framework’ evidence provision to each jurisdiction, pending wholesale reform is advanced. The provision is tailored to meet the needs of the respective jurisdictions considered, and the amendments are designed to complement future reform to the partial defences. The publications include: (v) ‘Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes’;⁸¹ (vi) ‘Political rhetoric or principled reform of loss of control? Anglo-Australian perspectives on the exclusionary conduct model’;⁸² and, (vii) ‘Anglo-Antipodean Perspectives on the Positive Restriction Model and Abolition of the Provocation Defence’.⁸³

Part Four broadens the analysis to assess the availability of self-defence to the primary victim, addressing difficulties in raising self-defence and loss of control simultaneously. The objective is to deliver a detailed exposition of the availability of self-defence, and the legitimacy of reverting to a partial defence where self-defence fails. Two bespoke partial defences, designed to accommodate the circumstances of the primary victim, are advanced. The first is a self-preservation defence, and the second is a fear of serious violence defence containing several threshold filter mechanisms designed to preclude the availability of the partial defences in unmeritorious cases. The recommendations are complemented by the use of social framework evidence (considered in Part Three), and the introduction of an interlocutory appeal procedure designed to prevent unnecessary litigation. The latter defence has been drafted and is being considered by the NZ Law Commission.⁸⁴ The publications include: (viii) ‘Battered women, startled householders and psychological self-defence: Anglo-Australian Perspectives’;⁸⁵ and, (ix) “‘His home is his castle. And mine is a cage’’: A New Partial Defence for Primary Victims Who Kill’.⁸⁶

⁸¹ *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (n 64) 183-206.

⁸² *Journal of Criminal Law* (2013) 77 (6), 512- 542.

⁸³ *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (n 1) 365-405.

⁸⁴ NZ Law Com IP 39, 2015 (n 11).

⁸⁵ (2013) *Journal of Criminal Law* 77(5), 433-457.

⁸⁶ (2015) *Northern Ireland Legal Quarterly* 66(2) 151-77.

Part One: *Intoxication, Alcohol Dependence Syndrome and Partial Defences to Murder*

- (i) ‘Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed, and Something New’⁸⁷
- (ii) ‘Recognising Acute Intoxication as Diminished Responsibility? A Comparative Analysis’⁸⁸

Introduction

Part One of this collection focuses upon vulnerable offenders who raise the spectre of co-morbidity. Determining the legal culpability of this category of offender has always proved difficult for the legislature and the courts. From a public policy perspective, the law stipulates that the voluntarily intoxicated offender ought not to be able to escape criminal liability on grounds of intoxication. Voluntary induced intoxication is never a defence, save in the context of specific intent offences and as a denial of the requisite *mens rea* at the time of the criminal act.⁸⁹ As Brooks identifies: ‘the criminal law is a crude instrument making few exceptions’⁹⁰ in this context. The position becomes complicated where the offender suffers from a mental condition in addition to being voluntarily intoxicated at the time of the fatal act. In cases where the mental disorder is linked to the alcohol consumption, this ostensible delineation between inculpatory and exculpatory conduct becomes blurred.⁹¹

Set at a time when the partial defences to murder had recently been altered by the Coroners and Justice Act 2009 (‘CAJA 2009’), the publications in this part of the collection chart the approach that was adopted in relation to this discrete category of offender pre-2010, before providing guidance to interpreting the (then) new provisions. In (i), the reader is introduced to the partial defences to murder operating in E&W; loss of control,

⁸⁷ *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (n 64) 183-207.

⁸⁸ (n 74) 71-98.

⁸⁹ A point which is considered in detail in Part Two. See, *Majewski* (n 70). See, generally, Andrew Simester, ‘Intoxication is never a defence’ [2009] *Criminal Law Review* 3.

⁹⁰ Brooks, ‘Alcohol, Risks and Public Policy’ (n 75).

⁹¹ For discussion see Nicola Wake, ‘Alcohol dependence syndrome and diminished responsibility’ (2009) *Journal of Criminal Law* 73(1), 17-21 (note). Available at Appendix B.

and diminished responsibility. The key issues addressed relate to how the law does and should approach the intoxicated and mentally abnormal killer in the context of a murder charge. The publication explores the type of 'recognised medical condition' required to form a valid basis for a diminished responsibility plea, in addition to providing an assessment of the extent to which voluntary intoxication and/or mental abnormality might be attributed to the characterisation of a societal expectation of reasonable conduct for the loss of control defence. Reforms that would preclude the use of voluntary intoxication under these defences are advanced. The potential problems predicted in these publications were borne out in case law, and the posited solutions remain viable and supported options for future reform.⁹²

Publication (ii) explores the implications of the use of the ICD-10 and DSM in interpreting the 'recognised medical condition' requirement of the diminished responsibility defence, focusing on the exclusion of 'acute intoxication'. Fortson accurately identified it 'cannot be taken as a foregone conclusion the court will not exclude conditions that are merely temporary or transient'.⁹³ In terms of optimal reform, litigation⁹⁴ could have been averted by the exclusion of acute intoxication through the legislation. This reform recommendation is modelled upon the law in Scotland and NSW where voluntary acute intoxication is explicitly and tacitly excluded from the legislation within these jurisdictions, respectively.⁹⁵ The focus should be on ensuring the partial defence remains available to the vulnerable offender, whilst precluding it to those seeking to use it as an excuse when they commit murder following voluntary intoxication.

The analyses within both publications is set against an in-depth review of the US EMED defence, and the position in NZ where partial defences have been abolished. Experts recommended an EMED-based merged diminished responsibility and loss of con-

⁹² Considered in detail in the conclusion to this part. This collection focuses on voluntary intoxication. For a innovative approach to reforming the law on involuntary intoxication see: Thom Brooks, 'Involuntary intoxication: a new six-step procedure' (2015) *Journal of Criminal Law* 79(2), 138-146.

⁹³ Rudi Fortson, 'The Modern Partial Defence of Diminished Responsibility' in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility; Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2011) 29.

⁹⁴ See *Asmelash* (70) and *Dowds* (70).

⁹⁵ Section 51(3)B of the Criminal Procedure (Scotland) Act 1995 (as inserted by the Criminal Justice and Licensing (Scotland) Act 2010, section 168(3): 'a person...under the influence of alcohol drugs or any other substance at the time of the [killing] does not in itself-(a) constitute an abnormality of mind for the purposes of [the defence], or (b) prevent such abnormality of mind being established'.

trol provision.⁹⁶ The EMED defence was never intended to incorporate diminished responsibility, and this interpretation has resulted in rejection of the model in the majority of US jurisdictions, with negative ramifications for vulnerable offenders.⁹⁷ In NZ, the abolition of all general partial defences means there is a risk this vulnerable category of offender will be charged with murder, and, if convicted, serve a longer sentence.⁹⁸ The critique of the law in these jurisdictions demonstrates a careful balance must be achieved to ensure defences are broad enough to capture the circumstances of vulnerable offenders, but narrow enough to exclude unmeritorious claims.

⁹⁶ American Law Institute, *Model Penal Code* (1981) §210.3 (1) (b).

⁹⁷ Chalmers (n 27) 167-182. For discussion on the Scottish approach to diminished responsibility see, Robert S Shiels, 'The uncertain medical origins of diminished responsibility' (2014) *Journal of Criminal Law* 78(6), 467-476.

⁹⁸ See, for example, *Rihia* (n 70); *Wihongi* (n 70). For discussion, see (ix).

Publication (i)

‘Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed, and Something New’ in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2011) 183-207.

Chapter 12

Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed, and Something New

Alan Reed and Nicola Wake

Introduction

'I'd kill for another glass of wine!' For most of us this statement is mere hyperbole, or verbiage, and alcohol consumption is a weekend social pleasure or a voluntary adjunct on an evening to relieve another stressful working day. Unfortunately for a very small minority their level of alcohol abuse is serious and destroys lives in multifarious fashions. Alcohol dependency is often coterminous with other mental conditions of depression, paranoia or delusions. This chapter addresses the treatment of the severely intoxicated and mentally abnormal killer in the context of the partial defences to murder. It focuses on extant law prior to the Coroners and Justice Act 2009 legislative reforms, and reflects on the novel classificatory system adopted therein as applied to this discrete category of offenders. How should we reconcile or align conditions of depression with alcohol dependency syndrome in terms of potentially explanatory behavioural patterns towards partial exculpation? Can appropriate delineations be made between chronic/harmful/acute intoxication as relevant factors in the context of diminished responsibility? In respect of individual loss of self-control how relevant are voluntary intoxication or mental frailties to 'personification' or 'characterisation' of a societal expectation standard of 'reasonable' conduct?

A comparative extirpation is briefly provided in this regard by reviewing the position adopted in traditional states in the US, set against the liberalised regime prevailing in the few states that have adopted a version of the Model Penal Code (hereinafter MPC). The latter iteration focuses on the standard template of 'extreme mental or emotional disturbance'. It is submitted that extant law ought to reflect contemporary standardisations of attitudinal behaviour. There needs to be an appraisal, in effect as a moral and social barometer, of legitimate and appropriate rectitude and culpability of the chronic alcoholic or mentally abnormal killer.

Section 2 of the Homicide Act 1957 – Something Old

The partial defence of diminished responsibility represents an anomaly in English law. Introduced as a device to enable the courts 'to take account of a special category or "mitigating" circumstances',¹ the concessionary defence reduces murder to manslaughter in situations where the defendant suffers from a mental abnormality short of insanity.² Previously there had been a

¹ Law Commission, *Partial Defences to Murder* (Law Com. CP No 173, 2003) para. 6.8.

² *Ibid.*, paras 7.6–7.7.

'rigid dichotomy between sane or insane, responsible or not responsible, bad or mad'.³ Diminished responsibility in this regard supplied the law with a new moral and social barometer upon which a mentally abnormal defendant's lower level of responsibility could be measured. When the plea was first introduced the mandatory sentence for murder was the death sentence.⁴ By returning a verdict of manslaughter the defence gave the trial judge discretion in the sentence to be imposed.⁵ Retention of the mandatory life sentence for murder remains a key factor in the preservation of the partial defence in the twenty-first century, especially in light of piecemeal government reforms to homicide rather than a more radical restructuring of hierarchical offences as the Law Commission suggested.⁶ The Coroners and Justice Act 2009⁷ provisions in this regard, considered below, amend the concessionary defence in a manner which is arguably reflective of 'developments in diagnostic practice'.⁸ Predicated on an 'abnormality of mental functioning' arising from a 'recognised medical condition', the partial nature of the defence is retained, aligned with a burden of proof on the defendant.⁹

Under the original wording of s. 2 of the Homicide Act 1957 the defendant was required to prove an 'abnormality of mind'. Fact-finders were required to consider whether the 'abnormality of mind' arose 'from a condition of arrested or retarded development of mind or any inherent causes' or alternatively, whether the abnormality was 'induced by disease or injury'. Further, the jury were charged to determine whether the abnormality of mind 'substantially impaired' the defendant's 'mental responsibility' for the killing.

A controversial feature of the old law, subject to evaluation by the Law Commission,¹⁰ and a fascinating array of conflicting authorities, concerned the discordant relationship between the partial defence and established intoxication doctrine.¹¹ This dissonance was explicit in cases involving the intoxicated defendant who killed while suffering from an abnormality of mind. Initial debate concentrated on whether voluntary intoxication should preclude the partial defence to a mentally abnormal defendant,¹² with intoxication *per se* correspondingly stigmatised as potentially introducing an inculpatory fault element.¹³ More recently, deliberations have focused upon whether

³ Ibid., para. 6.52.

⁴ Ibid., para. 7.9.

⁵ Ibid., para. 7.7.

⁶ Law Commission, *Partial Defences to Murder* (Law Com. No 290, 2004) paras 5.10–5.11. See generally, Law Commission, *Murder, Manslaughter and Infanticide* (Law Com. No 304, 2006).

⁷ Section 52 of the Coroners and Justice Act 2009 amended s. 2 of the Homicide Act 1957 on 4 October 2010 (Coroners and Justice Act 2009 Transitional and Saving Provisions (Commencement No 4) Order 2010, SI 2010/816, Art. 5). The original wording of s. 2 of the Homicide Act 1957 continues to apply to acts committed wholly, or in part, before 4 October 2010 (Coroners and Justice Act 2009 sch. 22, para. 7).

⁸ Ministry of Justice, *Murder, Manslaughter and Infanticide* (MoJ CP No 19, 2008) para. 49.

⁹ Homicide Act 1957, s. 2 (as amended by Coroners and Justice Act 2009, s. 52). Placing the burden of proof on the defendant is not incompatible with the European Convention on Human Rights, Art. 6(2); *Lambert, Ali and Jordan* [2002] QB 1112.

¹⁰ Law Com. CP No 173, 2003 (n. 1) para. 7.71–7.92. See also Law Com. No 290, 2004 (n. 6) para. 5.85.

¹¹ See further discussion below. See also *Majewski* [1977] AC 443; and Andrew Simester, 'Intoxication Is Never a Defence' [2009] Criminal Law Review 1, 3–14.

¹² See for example, *R v. Dietschmann* [2003] UKHL 10 (HL), [2001] EWCA Crim 2052 (CA); *R v. Egan* (1992) 95 Cr App R 278 (CA); *R v. Inseal* [1992] Crim LR 35 (CA); *R v. Atkinson* [1985] Crim LR 314 (CA); *R v. Gittens* (1984) 79 Cr App R 272 (CA), [1984] QB 698 (CA), [1984] 3 WLR 327 (CA); *R v. Fenton* (1975) 61 Cr App R 261 (CA).

¹³ Simester (n. 11).

alcohol dependence syndrome could independently constitute an abnormality of mind, and exist as a bespoke qualifying condition.¹⁴ Doctrinal criminal law principles have struggled, often in vain, to keep pace with ascertainable psychiatric developments *vis-à-vis* alcohol dependence syndrome and alcohol abuse in this arena. The jurisprudential landscape prior to the 2009 reforms highlighted the dilemmatic choice(s) presented to the courts in demarcation of the alcoholic killer who may also be suffering from other medical conditions.

In the context of s. 2(1) of the Homicide Act 1957, the 'abnormality of mind' requirement was not a 'legal or medical concept';¹⁵ however, it was soon recognised that the phrase was capable of encompassing both 'volitional' and 'cognitive' disorders.¹⁶ The seminal case of *Byrne*¹⁷ interpreted the 'abnormality of mind' requirement as:

[a] state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It is wide enough to cover the mind's activities in all aspects, not only the perception of physical acts and matters, and the ability to form a rational judgement as to whether an act is right or wrong, but also *the ability to exercise will power to control physical acts in accordance with that rational judgement*.¹⁸

The impact of the decision in *Byrne* was to broadly introduce the concept of 'irresistible impulse' into English law as an element of the partial defence.¹⁹ Subsequently, in *Fenton*,²⁰ the appellate court identified that 'cases may arise where the accused proves such a craving for drink or drugs as to prove in itself an abnormality of mind'.²¹ This postulation, although implying that the diminished responsibility plea could be made available in rare situations to the chronic alcoholic, failed to specify how such a defendant would meet the 'abnormality of mind' requirement, and the level of impairment that was tangentially related to facilitate the defence.

The 'craving for drink' aphorism in *Fenton* received direct consideration in the pivotal appellate decision of *Wood*,²² immediately prior to recent legislative enactments. It is suggested that *Wood* is central to evaluation herein in terms of the old and new law. The defendant was a chronic alcoholic, and had killed the victim who allegedly made unwanted homosexual advances. The defendant had engaged in a 36-hour drinking session prior to the fatal act. Medical experts called for the defence and the Crown were in unanimity *vis-à-vis* the import and level of the defendant's alcohol dependence syndrome. Although the defendant had not suffered brain damage as a result, he manifested at least six of the symptoms identified by the ICD-10 criteria for alcohol dependence syndrome, considered below.²³ The question was whether the defendant's alcohol dependence syndrome constituted a 'disease', capable of giving rise to an 'abnormality of mind'

¹⁴ See, for example, *R v. Stewart* [2009] EWCA Crim 593 (CA), [2009] 1 WLR 2507 (CA); *R v. Wood* [2008] EWCA Crim 1305 (CA), [2008] 2 Cr App R 34 (CA); *R v. Tandy* [1989] 1 WLR 350 (CA), (1988) 87 Cr App R 45 (CA).

¹⁵ Law Com. CP No 173, 2003 (n. 1) para. 7.22.

¹⁶ *Ibid.*, para. 7.6.

¹⁷ [1960] 2 QB 396 (CA).

¹⁸ *Ibid.*, 403 (Parker LJ) (emphasis added).

¹⁹ Ronnie Mackay, 'The Abnormality of Mind Factor in Diminished Responsibility' [1999] Criminal Law Review 117, 118.

²⁰ *Fenton* (n. 12).

²¹ *Ibid.*, 263 (Lord Widgery CJ).

²² *Wood* (n. 14).

²³ *Ibid.*, [9]. See generally, World Health Organization (Management of Substance Abuse: Dependence Syndrome) <http://www.who.int/substance_abuse/terminology/definition1/en/> (accessed 19 March 2011).

for the purposes of the diminished responsibility plea. In effect, should the jury be entitled to take into account the defendant's alcohol dependence syndrome when assessing the abnormality of mind requirement where that alcohol dependence syndrome had not resulted in observable brain damage? The trial judge, in light of earlier precedential authorities, struggled with the notion of an intoxicated defendant being afforded the partial defence, and provided a straitened test that the alcohol dependence syndrome would *only* be relevant if the defendant suffered brain damage as a result, or alternatively, if *every* drink consumed on the day of the killing was truly involuntary.

A prevailing judicial resistance existed, constraining the nature of the partial defence, and refusing to deviate from the established principle that voluntary intoxication did not negate the defendant's criminal liability, save in the limited context of specific intent offences and operatively as a denial of the requisite *mens rea* at the time of the relevant act.²⁴ Prior to *Wood*, the appellate court in *Tandy* had stipulated that 'the law simply will not allow a drug user, whether the drug be alcohol or any other, to shelter behind the toxic effects of the drug which he or she need not have used'.²⁵ In that context, the law rendered the question of whether the defendant 'could not resist his impulse' and whether he 'did not resist his impulse' nugatory in situations where the first drink of the day had been voluntary.²⁶ The effect was to 'accept the doctrine of diminished responsibility as it applies to alcoholism only in terms of black and white rather than shades of grey: either the defendant was wholly incapable of resisting the impulse to drink or [he] was responsible for [his] actions and should be convicted of murder'.²⁷

The idea that *every drink* consumed by the chronic alcoholic had to be involuntary was antithetical to the 'concept of alcoholism as a disease'.²⁸ Even a 'true alcoholic' would stop drinking sometimes, for example to get dressed, wash and go to bed. Moreover, the concessionary defence had been introduced as a moral and social barometer upon which the defendant suffering from a mental abnormality short of insanity should be adjudged. There was no stipulation within s. 2 of the Homicide Act 1957 which required the defendant to be acting under 'some form of automatism' in order to establish the defence.²⁹ In essence, the courts failed to recognise that 'a world of difference' existed between cases of homicide where the defendant killed whilst voluntarily intoxicated and killings committed under the influence of alcohol dependence syndrome.³⁰

The stark reality of the law's failure to understand alcohol related disorders had been made clear following the death of Linda Tandy,³¹ who committed suicide in prison, shortly after the Court of Appeal upheld her conviction for murder.³² The defendant was a chronic alcoholic, and had killed her daughter by strangulation after having consumed almost an entire bottle of vodka. The trial judge's direction, confirmed on appeal in an 'unduly artificial and restrictive'³³ fashion, was to the effect that the defendant's alcoholism would only have caused a gross impairment of her

24 *Majewski* (n. 11).

25 *Tandy* (n. 14) 354 (Watkins LJ, citing the trial judge's direction).

26 Andrew Ashworth, 'Diminished Responsibility: Defendant Diagnosed as Suffering from Alcohol Dependency Syndrome but Having Sustained no Brain Damage as Result' [2008] Criminal Law Review 976, 978.

27 Jonathan Goodliffe, '*R v. Tandy and the Concept of Alcoholism as a Disease*' (1990) 53 Modern Law Review 809, 809-14.

28 *Ibid.*

29 *Wood* (n. 14) [37] (Sir Igor Judge P).

30 Law Com. No 290, 2004 (n. 6) para. 5.45 (Dr Keith Rix).

31 *Tandy* (n. 14).

32 Nicola Padfield, *Criminal Law* (7th edn, Oxford University Press, 2010) 190.

33 Law Com. No 290, 2004 (n. 6) para. 5.85, and Law Com. CP No 173, 2003 (n. 1) para. 7.82.

judgement and emotional responses (an abnormality of mind) if she had suffered brain damage as a result, or alternatively if every drink taken on the day of the killing had been involuntary.

The impact of *Tandy* was to introduce an unreasonable test, unduly constrained in ambit, which required the defendant to 'conform to a model of alcoholism that even the most hardened alcoholic would find difficult to meet'.³⁴ If the chronic alcoholic was unable to conform she would be adjudged according to the normative expectations society has of the ordinary sober person, rather than as an individual suffering from a mental abnormality. The decision showed a flagrant disregard for the moral and social barometer set by s. 2 of the Homicide Act 1957, by supplanting the provision with a juridical bar which required the chronic alcoholic to have suffered brain damage or be acting, in effect, under 'some form of automatism' before she could establish the partial defence.³⁵ As Mackay expertly articulated, 'It is one thing to say that the accused may be suffering from an abnormal craving for drink, but quite another to require that before such a craving can be established, the first drink in the relevant series must be shown to have been consumed "involuntarily"'.³⁶ In reality it was not the first drink, but the cumulative effect of the alcohol consumption, which resulted in the defendant's grossly impaired judgement.³⁷ The determination in *Tandy* fundamentally undermined the rationale underpinning the partial defence by failing to recognise that a complete destruction of the defendant's free will was not required for her liability to have been substantially impaired.³⁸

The House of Lords in *Dietschmann*,³⁹ in light of the vituperative criticism levelled at the effects of the *Tandy* decision, had the opportunity to reassess the appropriate standardisation. Their Lordships were required to reconcile and separate coterminous issues of depression aligned with intoxication. Seizing the chance to partially reinstate the ethical barometer of responsibility afforded by the defence, the House of Lords considered that the primordial focus in such cases should be on the underlying mental abnormality distilled from the intoxication. Lord Hutton identified that the issue was not whether the defendant would have carried out the killing in the absence of intoxication, but whether, if he did kill, he killed under diminished responsibility.

The appellate court in *Wood* considered that the House of Lords decision in *Dietschmann* required 'a reassessment' of the way in which *Tandy* had been applied in the context of alcohol dependency syndrome where observable brain damage had not occurred.⁴⁰ No requirement existed for brain damage to have resulted from alcohol dependence syndrome, but fact-finders could still evaluate whether the extent and nature of the syndrome met the abnormality of mind threshold. In future cases the court would be required to 'focus exclusively on the effect of alcohol consumed by the defendant as a *direct result* of his illness or disease and ignore the effect of any alcohol consumed voluntarily'.⁴¹ It was no longer the case that unless every drink consumed by a defendant on the fatal day was involuntary, then the syndrome was to be disregarded. Rather the posited issue for jury evaluation became whether an accused's mental responsibility for the conduct was substantially impaired as a concomitant of the alcohol, 'consumed under the baneful influence of the syndrome'.⁴² Despite the ostensible difficulties associated with a test which appears to require

34 Julia Tolmie, 'Alcoholism and Criminal Liability' (2001) 64 *Modern Law Review*, 688.

35 *Wood* (n. 14) [37] (Sir Igor Judge P).

36 See generally, Ronnie Mackay, *Mental Condition Defences in Criminal Law* (Oxford University Press, 1995) 8.

37 Law Com. CP No 173, 2003 (n. 1) para. 7.82.

38 Mackay (n. 36) 197.

39 *Dietschmann* (n. 12).

40 *Wood* (n. 14) [41] (Sir Igor Judge P).

41 *Ibid.*, [41] (Sir Igor Judge P).

42 *Ibid.*, [40] (Sir Igor Judge P).

the jury to 'separate out each drink of the day',⁴³ the decision in *Wood* represented a significant jurisprudential landmark in repudiating the artificial bar that had prevented alcohol dependent defendants from relying on the partial defence.

The revised test 'delineated more by mud than by crystal'⁴⁴ invited the jury to engage in mental gymnastics to determine 'the degree of voluntariness and involuntariness in the defendant's drinking'.⁴⁵ Unsurprisingly, the appellate court in *Stewart*,⁴⁶ immediately following *Wood*, deemed it appropriate to provide further guidance for juries, *vis-à-vis* the articulation of the defence in terms of appropriate specimen directions for future signposting. The consumption of vast amounts of alcohol could reduce murder to manslaughter:

first, where the effect of the intoxication was so extreme that the prosecution had failed to prove the necessary intention to kill or cause grievous bodily harm; and, second, assuming that the necessary intention was proved notwithstanding the consumption of alcohol, on the basis of diminished responsibility.⁴⁷

In determining whether the defendant's mental responsibility was substantially impaired, Lord Judge CJ in *Stewart* pronounced an additional list of five 'contact-counting' factors upon which the fact-finder should be invited to form their own judgement incorporating: (a) the extent and seriousness of the defendant's dependency, if any, on alcohol; (b) the extent to which his ability to control his drinking or to choose whether to drink or not, was reduced; (c) whether he was capable of abstinence from alcohol, and, if so; (d) for how long; and (e) whether he was choosing for some particular reason, such as a birthday celebration, to decide to get drunk, or to drink even more than usual.⁴⁸ These five 'contact-counting' factors ask the jury to do no more than apply their common sense in determining whether the defendant's responsibility for the killing was substantially impaired. The common sense approach advocated in *Stewart* was reaffirmed in *Ramchurn*,⁴⁹ as part of a trilogy of decisions prior to enforcement of s. 52 of the Coroners and Justice Act 2009. The appellate court in *Ramchurn* reflected that 'substantially impaired' within the purview of s. 2(1) of the Homicide Act 1957 meant something 'more than trivial but less than total'. This was in line with the earlier ruling in *Lloyd*⁵⁰ which amounted to authority that the word 'substantial' constituted a word 'for which one should not try to find a synonym. It is a word which members of the jury, with their own common sense, can tell what it means.'⁵¹ The direction was 'a welcome departure from the current trend towards requiring the jury to be directed to do what their common sense would naturally lead them to do anyway'.⁵² The decision in *Ramchurn* indicated that providing the chronic alcoholic's condition was more than trivial, the question of

43 *Stewart* (n. 14) [28].

44 Alan Reed, 'Alcohol Dependency Syndrome and the Ambit of Diminished Responsibility' (2009) 173 *Criminal Law and Justice Weekly* 263; see also Nicola Wake, 'Alcohol Dependency Syndrome and Diminished Responsibility' (2009) *Journal of Criminal Law*, 17.

45 Ashworth, 'Diminished Responsibility: Defendant Diagnosed as Suffering from Alcohol Dependency Syndrome but Having Sustained no Brain Damage as Result' (n. 26) 978.

46 *Stewart* (n. 14).

47 *Ibid.*, [29] (Sir Igor Judge P).

48 *Ibid.*, [34] (Sir Igor Judge P).

49 [2010] EWCA Crim 194 (CA).

50 (1966) 50 Cr App R, 61, 63.

51 *R v. Mitchell*, *The Times*, 2 December 1994; John Smith, '*R v. Mitchell*' [1995] *Criminal Law Review* 506 (note).

52 *Ibid.*, 506–7.

whether his responsibility was substantially impaired should be left to the jury. Following *Stewart* it was evident that the more serious the defendant's alcohol dependence syndrome, the more likely it became that his responsibility was substantially impaired.

The pre-2009 position regarding assessments of mental abnormality and chronic intoxication, iterated in *Dietschmann* and *Wood*, reflected a significantly more liberalised and empathetically valid perspective than the restrictive deontological approach applied in *Tandy*.⁵³ The contemporary contextual approach to intoxication doctrine, with a predominant emphasis on 'mental abnormality', was more in keeping with developments in medical understanding of substance disorders, albeit points of confusion remained. The beguiling judicial precedents in this context highlighted that recognition of substance disorders had developed beyond the malfunctioning identified within the original plea.⁵⁴ It is significant to re-evaluate how the alcoholic killer or mentally abnormal accused will now be treated within the confines of new reforms.

Coroners and Justice Act 2009, Section 52 – Something New

Parliament made significant revisions to the original diminished responsibility plea in s. 52 of the Coroners and Justice Act 2009, and key provisions became effective in law on 4 October 2010, replacing s. 2(1) of the Homicide Act 1957. The revised formulation postulates a new test for alcohol dependency syndrome in cases akin to *Wood* and *Stewart* where diminished responsibility is adduced. It also imports principles adduced in *Dietschmann* more directly into a legislative framework. The defendant, to rely on the reformulated defence, must now be shown to have been suffering from an 'abnormality of mental functioning'.⁵⁵ Medical experts will be charged to provide evidence as to whether this abnormality of mental functioning arose from a 'recognised medical condition'.⁵⁶ Alcohol dependence syndrome must comport to this straitened test with evaluation of the International Classification of Diseases (ICD-10)⁵⁷ and the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) criteria for alcohol dependence syndrome of potential significance.

It is noteworthy that the DSM-IV-TR diagnosis can only be made if three or more of the following conditions have been present simultaneously at some time during the previous year. These incorporate: (a) tolerance; (b) withdrawal; (c) taking the substance in larger amounts over a longer period than intended; (d) a persistent desire or unsuccessful efforts to cut down or control substance abuse; (e) a great deal of time spent in activities necessary to obtain the substance; (f) giving up important social, occupational and recreational activities; and (g) continuing use of the substance, notwithstanding knowledge that this had caused recurrent physical and psychological

⁵³ Law Com. No 290, 2004 (n. 6) para. 5.85.

⁵⁴ Law Com. No 304, 2006 (n. 6) para. 5.111.

⁵⁵ Homicide Act 1957, s. 2(1), as amended by the Coroners and Justice Act 2009, s. 52.

⁵⁶ *Ibid.*, s. 2(1)(a).

⁵⁷ The ICD-10 diagnosis can only be made if three or more of the following conditions have been present simultaneously at some time during the previous year: (a) a strong desire or compulsion to drink alcohol; (b) difficulty in controlling alcohol use; (c) a physiological withdrawal state; (d) evidence of tolerance; (e) progressive neglect of alternative pleasures or interests; and (f) persistent use of alcohol despite evidence of harmful consequences; World Health Organization (ICD-10: Mental and behavioural disorders due to psychoactive substance abuse, Ch. V, F10–F19) <<http://apps.who.int/classifications/apps/icd/icd10online/>> (accessed 28 March 2011).

problems.⁵⁸ The new provision itself does not define 'recognisable medical condition', but evidently alcohol dependence syndrome will satisfy this criterion given recognition of the syndrome by these leading classificatory systems.

Further, the fact-finders are required to consider two issues in order for the partial defence to be crystallised. First, the jury will be required to decide whether the recognised medical condition substantially impairs the defendant's ability to: (a) understand the nature of the defendant's conduct; (b) form a rational judgment; or (c) exercise self-control.⁵⁹ Secondly, the jury would have to assess whether the mental abnormality provides an explanation for the killing.⁶⁰ Moreover, it is asserted in s. 52 that an explanation will be provided if 'it causes, or is a significant contributory factor in causing the person to carry out that conduct'. This latter requirement, arguably implicit under the old law, but applied 'benevolently' in favour of a defendant, has now become explicit as part of a narrowed ambit for this defence.⁶¹

Pre-2009 consultation, conducted by the government and the Law Commission, revealed very disparate views on contemporary standardisation and attitudinal behaviour attached to those suffering from medical conditions brought on by long-term abuse of alcohol or drugs, and whether this category of offenders ought to be excluded from using the partial defence.⁶² One consultee proposed a formulation of the defence which would be available to those suffering from 'a mental disorder as defined in s. 1 of the Mental Health Act 1983' which would specifically exclude 'any temporary alteration of mental state caused by drugs of any kind'.⁶³ As 'knowledge of mental illness is a developing science' the Commission considered that tying the revised plea to the 'definition contained in the Mental Health Act 1983 might be over restrictive'.⁶⁴ The 'recognised medical condition' requirement under the Coroners and Justice Act is, therefore, designed to accommodate future 'developments in diagnostic practice'.⁶⁵ It is expected that the wording of the defence will 'encourage reference within expert evidence to diagnosis in terms of one or two of the accepted international classificatory systems of mental disorders (WHO ICD10 and AMA DSM)'.⁶⁶ Interestingly, from 2013 the DSM-V Substance Use Disorder Workgroup recommends that alcohol abuse and alcohol dependence syndrome be combined into one disorder of graded clinical severity, with two criteria required to make a diagnosis. At present, a diagnosis of alcohol abuse can be made under DSM-IV-TR if one or more of the following conditions have been present at some time during the previous year: (a) recurrent substance use resulting in a failure to fulfil major role obligations at work, school, home; (b) recurrent substance use in situations in which it is physically hazardous; (c) recurrent substance-related legal problems; (d) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance.⁶⁷

⁵⁸ American Psychiatric Association, *DSM-IV, Diagnostic and Statistical Manual of Mental Disorders* (4th edn, Washington, DC, 1994).

⁵⁹ Above (n. 55) s. 2(1A)(a)–(c).

⁶⁰ *Ibid.*, s. 2(1B).

⁶¹ See, generally, Ronnie Mackay, '(2) The New Diminished Responsibility Plea' [2010] *Criminal Law Review*, 290, 297–300.

⁶² Ministry of Justice, *Murder, Manslaughter and Infanticide* (MoJ CP No 19, Response to consultation, 2008) para. 91.

⁶³ Law Com. No 290, 2004 (n. 6) para. 5.67.

⁶⁴ *Ibid.*, para. 5.76.

⁶⁵ Law Com. No 304, 2006 (n. 6) paras 1.49 and 5.107.

⁶⁶ *Ibid.*, para. 5.114 (Royal College of Psychiatrists).

⁶⁷ DSM-IV (n. 58).

The rationale behind the move to a single disorder of graded clinical severity is that the current distinction between dependence and abuse renders ongoing diagnoses of alcohol abuse less reliable than ongoing diagnoses of dependence syndrome.⁶⁸ The distinction was also criticised as creating 'diagnostic orphans' who might satisfy two of the criteria for dependence but none of the conditions required for a diagnosis of abuse.⁶⁹ If the Workgroup's recommendation is accepted, alcohol dependence syndrome will no longer be recognised as an independent disorder for the purposes of the DSM. Instead the DSM-V manual will refer to 'substance use disorder' which will be diagnosed where two or more of the symptoms identified for alcohol dependence syndrome and/or alcohol abuse are present simultaneously in a 12-month period.⁷⁰ Clearly 'substance use disorder', in requiring only two symptoms, will be diagnosed more readily than current diagnoses of alcohol dependence syndrome. This renders the new defence potentially more generous to the alcoholic defendant than the original plea.

The revised plea remains silent as to levels of gradation of voluntary intoxication that may or may not constitute a 'mental abnormality' when an individual kills. It is likely that the courts will be required to consider whether states of acute intoxication (drunkenness) will satisfy the 'recognised medical condition' requirement, given that acute intoxication is regarded by the ICD-10 as a disorder of clinical significance.⁷¹ Although acute intoxication is unlikely to satisfy the requirement, it might have been beneficial if the legislation were to include specific direction on this issue, rather than requiring the courts to distinguish, *inter alia*, between acute intoxication, harmful use, alcohol abuse (considered above) and alcohol dependence syndrome.⁷² This problem may not arise north of the border. The newly proposed diminished responsibility plea in Scotland states 'that a person ... under the influence of alcohol, drugs, or any other substance at the time of the [killing] does not in itself – (a) constitute abnormality of mind for the purposes of [the defence],

68 Deborah Hasin, Andrea Paykin, Jean Endicott and Bridget Grant, 'The Validity of DSM-IV Alcohol Abuse: Drunk Drivers versus All Others', *Journal of Studies on Alcohol and Drugs* (1990) 60, 6.

69 Deborah Hasin and Andrea Paykin, 'Dependence Symptoms but No Diagnosis: Diagnostic "Orphans" in a 1992 National Sample' (1992) *Drug and Alcohol Dependence*, 53, 3, 215–22.

70 'American Psychiatric Association DSM 5 Development' (Substance Use Disorder) <<http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=431#>> (accessed 19 March 2011).

71 'World Health Organization' (ICD-10: Mental and behavioural disorders due to psychoactive substance abuse, Ch. V, F10–F19) (n. 57).

72 *Ibid.* The WHO identifies several different mental and behavioural disorders arising from psychoactive substance use, as follows: acute intoxication ('A condition that follows administration of psychoactive substances resulting in disturbances in level of consciousness, cognition, perception, affect or behaviour, or other psycho-physiological functions and responses.');

harmful use ('A pattern of psychoactive substance use that is causing damage to health e.g. episodes of depressive disorder secondary to heavy consumption of alcohol.');

dependence syndrome ('A cluster of behavioural, cognitive, and physiological phenomena that develop after repeated substance use and that typically include a strong desire to take the drug, difficulties in controlling its use, persisting in its use despite harmful consequences, a higher priority given to drug use than to other activities and obligations, increased tolerance, and sometimes a physical withdrawal state.');

withdrawal state ('A group of symptoms of variable clustering and severity occurring on absolute or relative withdrawal of a psychoactive substance after persistent use of that substance.');

withdrawal state with delirium ('delirium tremens – alcohol induced');

psychotic disorder ('A syndrome associated with chronic prominent impairment of recent and remote memory. Immediate recall is usually preserved and recent memory is characteristically more disturbed than remote memory. Disturbances of time sense and ordering of events are usually evident, as are difficulties in learning new material. Confabulation may be marked but is not invariably present. Other cognitive functions are usually relatively well preserved and amnesic defects are out of proportion to other disturbances.')

The DSM-IV recognises alcohol abuse, considered in the text above.

or (b) prevent such abnormality from being established'.⁷³ The effect will be afford the defence to the intoxicated, but mentally abnormal defendant, akin to *Dietschmann*, *Wood* and *Stewart*, while excluding it to the voluntarily intoxicated defendant not suffering from an underlying mental abnormality. The Scottish Law Commission deemed it necessary to exclude the latter on the basis that 'an intoxicated person is at the time of intoxication suffering from an abnormal state of mind which does affect his ability to determine or control his conduct. Accordingly, the basis of the exclusion is not the definition of the plea, but the clear policy of the criminal law ... that voluntary intoxication does not elide criminal responsibility.'⁷⁴

Beyond the classificatory adoption of 'alcohol dependence'/'alcohol abuse' the real limitation on the defence exists in the three specified ways in which the defendant's ability can be 'substantially impaired'. It will be the role of the medical expert to offer an opinion on 'whether and in what way the abnormality had an impact on'⁷⁵ the defendant's ability to: (a) understand the nature of the defendant's conduct; (b) form a rational judgement; or (c) exercise self-control.⁷⁶ These three specified things are included⁷⁷ to 'make clear what impact on capacity the effects of an abnormality of mental functioning must have'.⁷⁸ Presumably alcohol related disorders will affect the defendant's level of 'self-control', although there may also be cases which affect the defendant's ability to form a 'rational judgement'.⁷⁹ It is likely that there will be disagreement between medical experts in this context, 'so it seems that the question of substantial impairment by the medical condition – not the alcohol voluntarily taken' will remain an onerous task for the jury.⁸⁰

The term 'substantial impairment' is one of few remnants of the original diminished responsibility plea. In this respect, it would seem that the courts will continue to apply the 'more than trivial but less than total' approach adopted in *Ramchurn* (see above). The jury will only be entitled to return a manslaughter verdict, however, if (providing all of the other elements of the defence are satisfied) the mental abnormality provides an explanation for the killing.⁸¹ In 2004 the Law Commission recommended that the abnormality must be a 'significant cause'⁸² of the killing, but repudiated that requirement following consultation.⁸³ Academicians in criminal law, together with the Royal College of Psychiatrists, specifically advised against the creation of 'a situation in which experts might be called on to "demonstrate" causation on a scientific basis'.⁸⁴ Despite this, the revised plea stipulates that an explanation will only be provided if 'it causes, or is a significant

73 New s. 51(3)B of the Criminal Procedure (Scotland) Act 1995 as inserted by the Criminal Justice and Licensing (Scotland) Act 2010, s. 168(3). Section 168 was still to be brought into force at the time of writing.

74 Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Scottish Law Commission No 195, 2004) para. 3.40.

75 Law Com. No 304, 2006 (n. 6) para. 5.117–5.118.

76 Above (n. 55) s. 2(1A)(a)–(c).

77 The first element bears resemblance to the first limb of the M'Naghten Rules (1843) 8 ER 718; (1843) 10 CJ & F 200, 210, which require the defendant to prove that the defendant 'did not know the nature and quality of the act he was doing'. The second and third elements are modelled on the leading judgment in *Byrne* [1960] 2 QB 396 (considered above).

78 Law Com. No 304, 2006 (n. 6) para. 5.121.

79 Ashworth, 'Diminished Responsibility: Defendant Diagnosed as Suffering from Alcohol Dependency Syndrome but Having Sustained no Brain Damage as Result' (n. 26) 978.

80 Ibid.

81 Above (n. 55) s. 2(1B).

82 Law Com. No 290, 2004 (n. 6) para. 1.17.

83 Law Com. No 304, 2006 (n. 6) para. 5.112.

84 Ibid., para. 5.123. See, generally, Jo Miles, 'A "Dog's Breakfast" of Homicide Reform' (2009) *Archbold News*, 10, 6.

contributory factor in causing the person to carry out that conduct'. In the context of substance related disorders it appears the causal requirement is likely 'to direct attention to the interaction of the medical condition with any other causal factor, such as alcohol consumption not stemming from the condition itself'.⁸⁵ The causative effect of alcohol voluntarily consumed will not prevent the defendant's alcohol dependence syndrome from 'substantially impairing his' mental capacity providing the disorder is a significant contributory factor in the killing. The rationale for this explicit causal requirement appears to be that the abnormality of mental functioning ought to be 'some connection between the condition and the killing in order for the defence to be justified'.⁸⁶ As Yeo identifies, if this is the case, the term 'explanation', as recommended in the Law Commission's 2006 report,⁸⁷ would have been preferable to the word 'cause', because this would avoid the difficulties associated with having to demonstrate a specific causal link.⁸⁸

Extreme Mental or Emotional Disturbance – Something Borrowed

In retaining diminished responsibility as an independent partial defence, the Law Commission had rejected recommendations of a merger between diminished responsibility and provocation predicated on the concept of extreme emotional disturbance.⁸⁹ This formulation is broadly derived from the MPC provocation proposal which requires the jury to determine whether the defendant killed 'under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse'.⁹⁰ The effect is to provide a wider mitigation than under the provocation doctrine applicable in 'traditional' states in the US, which is rooted in English common law antediluvian heritage, and is encapsulated by personification of a 'heat of passion' excusatory doctrine, embracing subjective and objective elements centred on the amorphous reasonable man conceptualisation.⁹¹ This implementation of heat of passion doctrine in traditional states is subject to solipsistic implementation in respective criminal law jurisdictions, but the pre-eminent inculcated adoption reflects the intentional killing of another while under the influence of a reasonably induced 'heat of passion' causing a temporary loss of normal self-control.⁹² As such, while individual characteristics of the accused are considered as part of subjective loss of self-control, they are excluded as part of the reasonable man anthropomorphism, beyond age and sex. In many respects this mirrors the English position, pre-reforms adopted in *DPP v. Camplin*⁹³ and *Attorney General for Jersey v. Holley*.⁹⁴ A radically different perspective, enervating current

⁸⁵ Ashworth, 'Diminished Responsibility: Defendant Diagnosed as Suffering from Alcohol Dependency Syndrome but Having Sustained no Brain Damage as Result' (n. 26) 978.

⁸⁶ MoJ CP 19, 2008 (n. 8) para. 51.

⁸⁷ Law Com. No 304, 2006 (n. 6) paras 5.112 and 9.20.

⁸⁸ Stanley Yeo, 'English Reform of Partial Defences to Murder: Lessons for New South Wales' (2010) 22 *Current Issues in Criminal Justice* 1, 6.

⁸⁹ Law Com. No 173, 2003 (n. 1) paras 12.78–12.81. See also Law Com. No 290, 2004 (n. 6) paras 3.59, 3.164–3.165; and Ronnie Mackay and Barry Mitchell, 'Provoking Diminished Responsibility: Two Pleas Merging into One' [2003] *Criminal Law Review* 745.

⁹⁰ Model Penal Code and Commentaries §210.3(1)(b) (hereinafter MPC).

⁹¹ See, generally, Douglas Brown, 'Disentangling Concessions to Human Frailty: Making Sense of Anglo-American Provocation Doctrine through Comparative Study' (2007) 39 *New York University Journal of International Law & Politics* 675.

⁹² See, generally, Wayne LaFave, *Criminal Law* (4th edn, West, 2003).

⁹³ *DPP v. Camplin* [1978] AC 705.

⁹⁴ *Attorney General for Jersey v. Holley* [2005] UKPC 23; [2005] 2 AC 580.

discussion, applies to the 'subjectivised provocation plea' within MPC jurisdictions,⁹⁵ identified herein as 'reform' states. The Code mitigates murder to manslaughter where:

Murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such an explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.⁹⁶

The partial defence requires the killing to have been committed 'under the influence of extreme mental or emotional disturbance'.⁹⁷ The cause of the disturbance is not restricted to acts committed by the victim⁹⁸ and the defence is not limited by a 'cooling-off' period.⁹⁹ The drafters of the Code recognised that a lapse of time between the disturbance and the fatal act may exaggerate the effect of the disturbance.¹⁰⁰ The defence may even be left to the jury in the absence of a provocative event, for example, a victim's refusal to accept gifts from the defendant.¹⁰¹

The Code also requires a 'reasonable explanation or excuse' for the disturbance.¹⁰² This is a partially subjectivised test which must be determined 'from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be'.¹⁰³ Failing to offer specific guidance on this aspect of the provision, the drafters of the MPC noted:

The term "situation" ... is designedly ambiguous and is plainly flexible enough to allow the law to grow in the direction of taking account of abnormalities that have been recognised in the developing law of diminished responsibility ... Like blindness or other physical infirmities, perhaps it should be that mental abnormality should be regarded as part of the actor's situation that is relevant to the moral assessment of his or her conduct.¹⁰⁴

The drafters identified that characteristics peculiar to the defendant such as 'an exceptionally punctilious sense of personal honour or an abnormally fearful temperament' would not always be 'irrelevant to the ultimate issue of culpability'.¹⁰⁵ Notwithstanding the ostensible subjectivisation¹⁰⁶

95 James Chalmers, 'Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism' [2004] Criminal Law Review 198, 211.

96 MPC (n. 90) §210.3(1)(b).

97 Ibid.

98 Law Com. No 290, 2004 (n. 6) App. F, para. 3.

99 Ibid. Many states have amended the partial defence to include a 'loss of self-control' requirement. See Chalmers (n. 95) 204.

100 MPC (n. 90) §210.0-213.5, 72, 73.

101 *People v. Casassa* 404 NE2d 1310 (NY 1980). See, also, Joshua Dressler, 'Why Keep the Provocation Defense? Some Reflections on a Difficult Subject' (2002) 86 Minnesota Law Review 959, 987; Stephen Garvey, 'Passion's Puzzle' (2005) 90 Iowa Law Review 1677, 1690; and Susan Rozelle, 'Controlling Passion: Adultery and the Provocation Defense' (2005) 37 Rutgers Law Journal, 197.

102 MPC (n. 90) §210.3(1)(b).

103 Ibid.

104 Ibid., §210.0-213.5, 72, 73.

105 Ibid., §210.3, 62. See also Rozelle (n. 101) 202.

106 Joshua Dressler, 'Rethinking Heat of Passion: A Defense in Search of a Rationale' [1982] 73 Journal of Criminal Law and Criminology 421, 431 (2), notes that 'the actor's sex, sexual preference, pregnancy, physical deformities, and similar characteristics are apt to be taken into consideration in evaluating the reasonableness of the defendant's behaviour'.

of the plea, in terms of provocation Chalmers has cogently identified that the formulation 'was never designed as a "merged" provision',¹⁰⁷ to embrace 'diminished responsibility' within the confines of mental disturbance. The lack of an equivalent diminished responsibility defence meant that 'the drafters were prepared to accept a "substantial enlargement" of the traditional plea of provocation'.¹⁰⁸ This liberalisation resulted in the proposal being met with considerable resistance amongst the states, with not a single state being prepared to adopt the provision in its entirety.¹⁰⁹ A common variation to the formulation was the repudiation of the term 'mental'.¹¹⁰ This is indicative of the bulwark prevailing against murder reductions to manslaughter predicated upon mental disorders within American jurisdictions,¹¹¹ and effectual rejection of alcohol dependence syndrome as a concessionary partial defence *per se*. Any attempt to introduce a diminished responsibility plea equivalent to that in English law occurred by sleight of hand, 'through the judicial back door'.¹¹² Of the five successful attempts to introduce the mitigation for murder, four were abolished upon adoption of the MPC.¹¹³ The fifth was abolished following public rioting in response to the decision in *People v. White*.¹¹⁴ White had assassinated Mayor Moscone and Harvey Milk in 1978. At his trial for first degree murder, White successfully pleaded diminished responsibility on grounds of a depressive condition. During the course of the trial it was suggested that a symptom of the depression was White's compulsion for junk food. Diminished responsibility subsequently became dubbed the 'Twinkie Defense'.¹¹⁵ Commenting on the risks associated with the diminished responsibility defence, the Drafters of the MPC stated:

By evaluating the abnormal individual on his own terms, [diminished responsibility] decreases the incentives for him to behave as if he were normal. It blurs the law's message that there are certain minimal standards of conduct to which every member of society should conform. By restricting the extreme condemnation of liability for murder to cases where it is warranted in a relativistic sense, diminished responsibility undercuts the social purpose of condemnation. In short, diminished responsibility brings formal guilt more closely in line with moral blameworthiness, but only at the cost of driving a wedge between dangerousness and social control. The MPC does not recognize diminished responsibility as a distinct category of mitigation.¹¹⁶

107 Chalmers (n. 95) 200. For alternative views see Mackay and Mitchell, 'Provoking Diminished Responsibility: Two Pleas Merging into One?' (n. 89); Ronnie Mackay and Barry Mitchell, 'Replacing Provocation: More on a Combined Plea' [2004] *Criminal Law Review* 219; Dressler, 'Why Keep the Provocation Defense? Some Reflections on a Difficult Subject' (n. 101) 985.

108 Chalmers (n. 95) 200. See also Law Com. No 290, 2004 (n. 6) para. 3.59.

109 Law Com. No 290, 2004 (n. 6) App. F, para. 5. See also Rozelle (n. 101) 209.

110 Law Com. No 290, 2004, *ibid.*, App. F, paras 5–6.

111 Stephen Morse, 'Criminal Law: Undiminished Confusion in Diminished Capacity' (1984) 75 *Journal of Criminal Law & Criminology*, 1, 24. See also Brown (n. 91) 701

112 *Ibid.*

113 Brown (n. 91). See also Law Com. No 290, 2004 (n. 6) para. 3.59.

114 172 Cal Rptr 612, 612 (Ct App 1981). See also the film, *The Times of Harvey Milk*.

115 See, generally, Kelly Snider, 'The Infamous Twinkie Defense – Fact or Fiction?' (2006) 9 *Annals of the American Psychotherapy Association* 42, 43.

116 MPC (n. 90) §210.3, 71.

A concomitant of requiring the 'reasonableness' analysis within the MPC to be conducted 'from the viewpoint of'¹¹⁷ the defendant provides a heightened discretion to the jury.¹¹⁸ This liberalisation has transmogrified the role of judge and jury in reform states, with primordial focus attached to the latter in a remarkably inclusionary fashion:

Jurors are told to put themselves into the defendant's position, to adopt his or her perspective and, yet, at the same time, to be "reasonable". They are asked to exercise independent "moral judgement", and, at the same time, adopt the defendant's vantage point.¹¹⁹

The extensive role of the jury in reform states, and allowing their consideration of 'appropriate' emotional disturbance, has facilitated a liberal perspective to partial defences beyond the confines of the Coroners and Justice Act 2009 provisions.¹²⁰ The fact-finders, as moral and sympathetic arbiters of justice, have been allowed to apply their particularised 'judicial' divining rod to normative considerations.¹²¹ The corollary, as Ramsey has suggested, is that 'allowing the broad defence in the first place, without providing any fixed standard to guide jury deliberation, erodes the criminal law's legitimacy and creates the potential for inconsistent, arbitrary results'.¹²² The Drafters of the Code conceded that, 'In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen.'¹²³

Although criticised for the ad hoc nature of relevant individual characterisation in provocation, and the 'unguided and undisclosed discretion'¹²⁴ presented to fact-finders in the subjectivised and empathetically intuitive nature of the MPC, nonetheless it has been asserted that the perspective advanced may be irrefragable:

Unfortunately, while the Code purports to solve the problem of tailoring an objective standard to the defendant, the solution it offers masks an illusion. Beyond that illusion, criminal law theory has yet to find a principle that will convincingly distinguish the characteristics that ought to be included from those that ought to be excluded when individualising the reasonable person standard. In the absence of such a theory, let alone a workable provision implementing a theory, it is hard to see any approach other than uncontrolled ad hoc discretion the MPC Drafters have adopted.¹²⁵

Arguably, a 'workable provision' for provocation enjoyed a period of gestation in English law, as set out in the following section, with the development of *control* and *response* characteristics attendant to the reasonable man. Unfortunately, this operational dichotomy was diluted by a

¹¹⁷ Ibid., §210.3(1)(b).

¹¹⁸ Chalmers (n. 95) 211, identifies that the MPC proposal assumes 'that there is some form of community standard on the proper borderline between murder and manslaughter which juries are capable of applying'. See, generally, Law Com. No 290, 2004 (n. 6) App. C.

¹¹⁹ Victoria Nourse, 'Passion's Progress: Model Law Reform and the Provocation Defense' (1997) 106 Yale Law Journal 1331.

¹²⁰ Chalmers (n. 95) 211.

¹²¹ See generally, Dressler 'Why Keep the Provocation Defense? Some Reflections on a Difficult Subject' (n. 101) 959; Rozelle (n. 101) 197.

¹²² Carolyn Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform' (2010) 100 Journal of Criminal Law & Criminology, 33.

¹²³ MPC (n. 90) §210.3, 5(a), 60-61.

¹²⁴ Paul Robinson, 'The Modern General Part: Three Illusions', in Stephen Shute and Andrew Simister, *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press, 2002) 75, 90-91.

¹²⁵ Robinson, *ibid.*

failure to develop a barometer of moral and social rectitude attached to ethically creditable or discreditable indicia. This tangentially prompted the need for a root and branch legislative reform of the provocation defence.

Provocation – Something Old

The defence of provocation in crimes of homicide, like diminished responsibility, has always represented an exceptional mitigatory factor in English law. In violent crimes that resulted in injury short of death, the fact that the accused committed the violent act under provocation did not affect the nature of the offence.¹²⁶ The fact that the provocation caused the accused to lose his self-control was merely a matter to be taken into consideration in determining the appropriate penalty to impose. In homicide, however, provocation effected a change in the offence, reducing it from murder, for which the penalty became imprisonment for life, to manslaughter where the penalty lay at the discretion of the judge.¹²⁷ The Coroners and Justice Act 2009 provisions in this regard, considered below, have replaced provocation with a straitened and constrained defence of loss of self-control subject to qualifying triggers,¹²⁸ but the partial nature of the defence is retained, aligned with a corresponding burden of proof on the prosecution.¹²⁹

A controversial aspect of the old law, subject to two detailed Law Commission Reports,¹³⁰ and a potpourri of conflicting authorities,¹³¹ focused on which of the defendant's personal characteristics could be attributed to the reasonable person as part of the objective (second limb) of the prevailing dual standard.¹³² The debate concentrated on whether the jury should be required or permitted to take into account individual characteristics of an accused, liable to affect the level of self-control that he or she could be expected to show in the face of any provocation. Should lower levels of ratiocination, and correspondingly, reduced expectation levels, be ascribed to an intoxicated, or an immature or mentally impaired defendant, in that they are unable to exercise the same level of self-control, in the context of provocation generally, as a sober adult with normal mental capacities?¹³³

The dilemmatic choice(s) that underpinned the above question centred on evaluations of who and how reasonable is the reasonable man. Lord Diplock, in *DPP v. Camplin*, expounded the best

¹²⁶ *Camplin* (n. 93) 705 and 713 (Lord Diplock).

¹²⁷ See, generally, Timothy Macklem, 'Provocation and the Ordinary Person' (1987) 11 *Dalhousie Law Journal* 126; and Alan Reed, 'Duress and Provocation as Excuses to Murder: Salutory Lessons from Recent Anglo-American Jurisprudence' (1996) 6 *Florida State University, Journal of Transnational Law and Policy* 51.

¹²⁸ Coroners and Justice Act 2009, s. 55.

¹²⁹ *Ibid.*, s. 54(5) states: 'On a charge of murder if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.'

¹³⁰ See Law Com. No 173, 2003 (n. 1); Law Com. No 290, 2004 (n. 6); and Law Com. No 304, 2006 (n. 6).

¹³¹ See below (nn. 147–153); and, see generally, Richard Holton and Stephen Shute, 'Self-Control in the Modern Provocation Defence' (2007) 27 *Oxford Journal of Legal Studies* 49; John Gardner and Timothy Macklem, 'Compassion without Respect? Nine Fallacies in *R v. Smith*' [2001] *Criminal Law Review* 623; and Dressler, 'Rethinking Heat of Passion: A Defense in Search of a Rationale' (n. 106).

¹³² The first limb prescribes a subjective test which relates to the defendant him or herself, and asks, was the defendant acting in a provoked manner within the legal meaning of the term?; and see *Duffy* [1949] 1 All ER 932.

¹³³ See, generally, John Gardner, 'The Gist of Excuses' (1998) 1 *Buffalo Criminal Law Review* 575.

known biographical iteration of the reasonable man for the purposes of the defence of provocation. He suggested that the 'reasonable man ... is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him'.¹³⁴ Lord Diplock consequentially posited two uses for the defendant's characteristics in answering the objective question, beyond the consideration of whether the defendant exhibited the power and self-control of an ordinary person of their own sex and age. The first concerned the extent to which characteristics may affect self-control, and thus the ease with which a defendant may be provoked. Academicians have at various times labelled these issues *provocability*,¹³⁵ and those characteristics which the reasonable man may be taken to possess in the determination of his power of self-control, *control* characteristics.¹³⁶ The second use which Lord Diplock perceived for the characteristics of the defendant was in determining the gravity of the provocation to the accused. This issue has been anthropomorphised as *provocativeness*,¹³⁷ and the corresponding characteristics, *response* characteristics.¹³⁸

The law developed, prior to the Coroners and Justice Act 2009 reforms, as it appears Lord Diplock envisaged, such that the list of characteristics, including alcoholism, immaturity and mental abnormality, with which it was possible to endow the reasonable man, differed depending on whether one was considering the issue of *control* or *response*. The problem created thereby for ethical determination by the fact-finders, as extrapolated below, was that any 'lodestar' in decision-making, attendant to a moral or social barometer of acceptable characteristics (or otherwise) for legitimate consideration, was obviated by the straitjacket of the *control/response* dichotomy. No morally acceptable standard developed of personification, operating as a barometer of social mores at a junction in time, but contrarily a distinctive hue emerged whereby fact-finders were inappropriately transmogrified to provide a normative as well as fact-finding function.

On the question of *response*, it appeared that the reasonable man shared any characteristics of the accused which affected the gravity of the provocation to him or her. The question of the gravity of provocation concerned those provoking events which were in some way directed at the relevant (*response*) characteristic.¹³⁹ Thus the reasonable man, when considering the issue of *response*, was invested with any characteristics of the accused, provided they were sufficiently permanent to meet the criterion of being a 'characteristic' within the meaning of the law, and of course, provided that it was the question of response that was being addressed. That was to say the provoking event(s) were somehow, in substance if not literally, directed at the characteristic in question.¹⁴⁰

The bifurcatory independence of applicable *response* and *control* characteristics, separated between the Scylla and Charybdis, received crystallisation in the seminal case of *Morhall*.¹⁴¹ In retrospect, the rejection of the morally positive pathway and social barometer indicia provided by

¹³⁴ *Camplin* (n. 93), 718.

¹³⁵ See Andrew Ashworth, 'The Doctrine of Provocation' (1976) 35 Cambridge Law Journal 292, 300, asserting: 'the proper distinction ... is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused's level of self-control should not'; and see, generally, John Smith [1995] Criminal Law Review 891 (note).

¹³⁶ Peter Seago and Alan Reed, 'Criminal Law' [1997] All England Law Reports Annual Review 117.

¹³⁷ Ashworth, 'The Doctrine of Provocation' (n. 135).

¹³⁸ Seago and Reed (n. 136).

¹³⁹ See, generally, Adrian Briggs, 'Provocation Re-Assessed' (1996) 112 Law Quarterly Review 403; and Alan Norrie, 'The Structure of Provocation' (2001) 54 Current Legal Problems 307.

¹⁴⁰ See, generally, Jeremy Horder, *Provocation and Responsibility* (Clarendon, 1991).

¹⁴¹ *Morhall* [1996] 1 AC 90.

the appellate court in *Morhall*¹⁴² represented a crucially significant jurisprudential landmark, and a precursor to the need for legislative reforms. The defendant was addicted to glue-sniffing, and had killed the victim who had taunted him about his inability to kick the habit. Thus, the provocation was directed at a particular trait of the defendant. The question was whether an addiction to glue-sniffing was to be taken into account in addressing the issue of how a reasonable person would have responded to the provocation. In effect, should the jury in assessing the gravity of the provocation be required to ask how a reasonable person addicted to glue-sniffing would have responded to a taunt about being addicted to glue-sniffing? Unsurprisingly, the Court of Appeal struggled with the very idea of a 'reasonable person' in this antithetical juxtaposition, and Lord Taylor CJ stated that the addiction could not be relevant because it was a characteristic repugnant to the concept of a reasonable person:

Otherwise, some remarkable results would follow. Not only would a defendant, who habitually abuses himself by sniffing glue to the point of addiction, be entitled to have that characteristic taken into account in his favour by the jury; logic would demand similar indulgence towards an alcoholic, or a defendant who had illegally abused heroin, cocaine or crack to the point of addiction. Similarly a paedophile, upbraided for molesting children, would be entitled to have his characteristic weighed in his favour on the issue of provocation. Yet none of these addictions on propensities could sensibly be regarded as consistent with the reasonable man ... they surely cannot include characteristics repugnant to the concept of the reasonable man.¹⁴³

The House of Lords, however, disagreed in *Morhall*, reversing the decision of the Court of Appeal, and suggesting that the 'reasonable' person, in this context, was merely a yardstick against which to measure the conduct of the defendant taking into account all the relevant circumstances.¹⁴⁴ That is to say, the reasonable person was not necessarily reasonable in the sense that they were absolutely morally upstanding; in fact, the obverse transpired as discreditable/creditable characteristics were to be treated alike provided a tautological link was evident – alcoholism, drug addiction, immaturity, mental abnormality were all part of the same subset provided a characteristic was 'permanent' not 'transitory' and thus potentially supererogatory if directly the subject matter of the taunt. The moral and social standardisation was rendered nugatory, an ethical barometer opportunity was obfuscated, supplanted by an excusatory template which, 'did not get to the nub of the problem'.¹⁴⁵

As for *control* characteristics, if Lord Diplock was to be taken literally, the list was closed. Age and sex, and only age and sex, would be relevant to powers of self-control. Prior to *Holley*,¹⁴⁶ however, a remarkable development occurred whereby in a panoply of cases a concoction of liberalised judicial assessments removed boundaries of moral/ethical rectitude attached to individual defendants. This solipsistic and ad hoc development, and with predictive outcome as likely as tattooing soap bubbles, was empathetically promulgated by a desire to allow certain defendants to benefit from the defence of provocation. A sympathetic hand was extended to normative evaluation of psychological/physiological conditions: battered women syndrome and personality disorder;¹⁴⁷

¹⁴² *Morhall* [1993] 4 All ER 888.

¹⁴³ *Ibid.*, 893.

¹⁴⁴ *Morhall* (n. 141) 98.

¹⁴⁵ Alan Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder: (1) Loss of Control' [2010] Criminal Law Review 275, 283.

¹⁴⁶ *Holley* (n. 94).

¹⁴⁷ *Thornton (No 2)* [1996] 2 Cr App R 108.

stress and anxiety effected by caring for a newborn baby;¹⁴⁸ obsessive traits;¹⁴⁹ emotional immaturity and attention-seeking behavioural patterns;¹⁵⁰ low intelligence;¹⁵¹ clinical depression;¹⁵² and even sexual jealousy and possessiveness.¹⁵³ A schism was created, viewed through different lenses as, 'an evaluative free-for-all in which anything that induces sympathy by the same token helps to excuse, and in which little more than lip service is paid to the all-important objective (impersonal) standard of the reasonable person',¹⁵⁴ and denigrated as 'weak excuse' theory;¹⁵⁵ or alternatively, 'that the criminal law ought not to expect people to behave in a manner beyond their abilities, and that this necessarily means we should reform the law in a way which is consistent with contemporary psychiatric and psychological thinking'.¹⁵⁶

Post-*Holley*,¹⁵⁷ the 'orthodoxy' of a closed list of age and sex as *control* characteristics was restored. The defendant's alcoholism (and by parity of reasoning other personality traits of depression, strong feelings of worthlessness, avoidant personality, and anxiety) was excluded from consideration in the context of a 'uniform objective standard',¹⁵⁸ and no longer were fact-finders, 'free to set whatever standard they consider appropriate in the circumstances by which to judge whether the defendant's conduct is "excusable"'.¹⁵⁹ A lengthy tradition existed that the transitory state of intoxication *per se* was inapplicable as a relevant characteristic,¹⁶⁰ but similarly in *Holley* a permanent condition of chronic alcoholism was stigmatised in similar vein:

the defendant's intoxicated state is not a matter to be taken into account by the jury when considering whether the defendant exercised ordinary self-control. The position is the same, so far as provocation is concerned, if the defendant's addiction to alcohol has reached the state that he is suffering from the disease of alcoholism.¹⁶¹

The *control* characteristics bulwark presented in *Holley* straddles the analytical and the practical, and is fundamental to the evaluation that follows of the new reforms. Our empirical and normative expectations differ, as Tadros expertly highlights,¹⁶² in the scenario of the voluntarily/involuntarily intoxicated offender. In the former case, although intoxication may have reduced the accused's capacity for self-control, nonetheless 'societal' expectations remain unaltered. A markedly different analysis prevails in relation to the 'in'-voluntarily intoxicated killer, suffering from a disease of alcoholism (see earlier) whereby, 'we no longer expect him to show the levels

148 *Doughty* (1986) 83 Cr App R 319.

149 *Dryden* [1995] 4 All ER 987.

150 *Humphreys* [1995] 4 All ER 1008.

151 *Acott* [1997] 1 All ER 706.

152 *Smith (Morgan)* [2001] 1 AC 146.

153 *Weller* [2003] EWCA Crim 815; [2004] 1 Cr App R 1.

154 John Gardner and Timothy Macklem (n. 131) 635.

155 Jeremy Horder, 'Between Provocation and Diminished Responsibility' (1999) 10 Kings College Law Journal 143, 145–6; and see, generally, Jeremy Horder, *Excusing Crime* (Oxford University Press, 2004) 125.

156 Barry Mitchell, Ronnie Mackay and Warren Brookbanks, 'Pleading for Provoked Killers: In Defence of *Morgan Smith*' (2008) Law Quarterly Review 675.

157 *Holley* (n. 94).

158 *Ibid.*, 593 (Lord Nicholls).

159 *Ibid.*

160 See for example, *McCarthy* [1954] 2 QB 105; and *Newell* (1980) 71 Cr App R 331.

161 *Holley* (n. 94) 594 (Lord Nicholls).

162 Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2010) 365–6.

of self-control that reflect normative reasons'.¹⁶³ This demarcation is rendered nugatory in *Holley*'s objective personification. The position taken in *Holley* attempted to draw a line between provocation and diminished responsibility, despite cogent views to the contrary on coalescence of the defences,¹⁶⁴ and alcoholism/mental abnormalities were pigeonholed accordingly. It left open an egregious situation whereby a defendant was not *sufficiently* mentally impaired to benefit from the defence of diminished responsibility, but also could not make use of provocation, because on the issue of self-control, no characteristics other than age or sex became casuistically relevant. The position has arguably worsened post-2010 reforms for categorisation of impairment not within the purview of 'medically recognised conditions',¹⁶⁵ potentially embracing delusions, paranoia, variants of anxiety disorders and avoidant personalities.

The Coroners and Justice Act reforms, considered below, can helpfully be deconstructed in the evaluative context of the post-*Holley* schematic template. A bizarre iteration prevailed, extrapolated from *response* and *control* characterisations. A clear distinction operated between characteristics of the defendant which were relevant to the degree of self-control exercised by the reasonable person (age and sex only are relevant); and characteristics which affect the gravity of the provocation to the defendant (any characteristics might be relevant). The fact-finders were consequently presented with a tautologous dilemma involving opaque mental gymnastics, and it was difficult for them to understand the difference. In a scenario where a drunken defendant was taunted about his alcoholism, the jury would be instructed to ignore his intoxicated state. However, in a volte-face, they would be expected to take into account his alcoholism in so far as it affected the gravity of the provocation to him but not in so far as it might have affected his ability to control himself. The yardstick against which the jury would be expected to measure the conduct of the defendant would be the 'reasonable' (sober, non-alcoholic) person being taunted about their alcoholism. Consider, similarly, a defendant as in *Luc*¹⁶⁶ suffering from organic brain disease, but taunted about their mental frailty. When determining the objective question, the fact-finders would have to be asked what the *response* to such a taunt would have been from a reasonable, non-mentally impaired person of the same age and sex of the defendant taunted about a mental abnormality which he or she actually had. In many respects jurors were placed in a perfidious conundrum.

A lack of definitional certainty also existed post-*Holley* in that situations prevailed where it was unclear whether a particular characteristic was being invoked on the self-control issue or on the touchstone of the gravity of the provocation. By way of postulation, as stated,¹⁶⁷ it is interesting to reflect a scenario where a defendant with a pathological sensitivity to noise was provoked by the sound of loud shouting. Did the nub of this dispute focus upon the accused asserting, 'My self-control is lowered by my sensitivity to noise' (in which case a court would be required to ignore it) or 'Noise affects me in an especially grave manner because of my sensitivity (in which case it could be taken into account)'. In essence, post-*Holley* our law lacked a moral and social barometer in terms of guiding characteristics, it demanded mental gyrations of confused jurors, and lacked definitional clarity. As such, it was ripe for reform, but has change brought cathartic panacea or simply engendered fresh ills in new bottles?

¹⁶³ Ibid., 366.

¹⁶⁴ See Mackay and Mitchell, 'Provoking Diminished Responsibility: Two Pleas Merging into One?' (n. 89); Ronnie Mackay and Barry Mitchell, 'But Is This Provocation? Some Thoughts on the Law Commission's Report on Partial Defences to Murder' [2005] Criminal Law Review 85; and Mitchell, Mackay and Brookbanks (n. 156).

¹⁶⁵ See, generally, Alan Reed and Ben Fitzpatrick, *Criminal Law* (4th edn, Sweet & Maxwell, 2009).

¹⁶⁶ *Luc Thiet Thuan* [1996] 2 All ER 1033.

¹⁶⁷ Reed and Fitzpatrick (n. 165).

The Coroners and Justice Act 2009 – Something Borrowed and Something New

The government, in setting qualifying triggers as preliminary filter devices for engagement of the new loss of self-control defence (replacing provocation), have consequently raised the discretionary bar in an exclusionary fashion. The prescribed aspiration has been to 'raise the threshold' so that words and conduct would constitute a defence 'only in exceptional circumstances'.¹⁶⁸ A by-product is that defendants in the types of 'provocative' situations presented in *Doughty*¹⁶⁹ (stressed parent of persistently crying child), or *Dryden*¹⁷⁰ (obsessional home owner embroiled in planning dispute), or *Baillie*¹⁷¹ (affronted parent of drug-dealing son) and presumptively *Morhall*¹⁷² (glue-sniffing addiction) are no longer within the operational purview of the defence as falling far below the threshold standard(s) of fear or justifiable anger. Maria Eagle, Parliamentary Under Secretary of State for Justice, set out the new terms in the following explicit fashion:

What we, therefore, sought to do in respect of the change to a provocation defence is to raise the threshold generally, so that those who kill in anger can succeed in having their conviction reduced to manslaughter only in exceptional circumstances. So, we are raising the bar of the availability of that defence and extending it to cover those who kill in fear of serious violence as well as those who kill in anger.¹⁷³

The new partial defence of loss of self-control contains a remodelled 'reasonable person' test, derived in part from *Camplin/Holley* in terms of 'control' elements, but obviates explicit reference to the taunt/characteristic linkage purveyed in *Morhall*. To the extent that *control/response* characteristics are relevant at all they have been coalesced together in a fudged merger. The ambit of permissible provocative conduct, in any event, is restrictively circumscribed as the accused's loss of self-control must be attributable to (i) a fear of serious violence¹⁷⁴ or (ii) circumstances of an extremely grave character which cause a justifiable sense of being seriously wronged.¹⁷⁵ In the latter context the law has broadly shifted away from the excusatory nature of the gravity of the provocation to the particularised defendant via the direct link of taunt and characteristic, and looks instead at partly condonable anger as a derivative of actions or words producing an insulted response.

This uncharted legislative sea change, as all key concepts are left undefined, has been expertly summarised as a shift from 'compassionate excuse' towards 'imperfect justification'¹⁷⁶ with a new moral and social barometer of partly appropriate anger; 'under the new ethical approach ... sympathy for human frailty is rejected in favour of a recognition of imperfectly justified anger. Anger is partially rightful ... it is the imperfectly valid moral connection between the provocation and the response that is relevant. Provocation causally links the anger felt to the deed done or

¹⁶⁸ HC Deb., Tuesday 3 February 2009, 8 (Maria Eagle, Parliamentary Under Secretary of State for Justice).

¹⁶⁹ *Doughty* (n. 148).

¹⁷⁰ *Dryden* (n. 149).

¹⁷¹ *Baillie* [1995] 2 Cr App R 31.

¹⁷² *Morhall* (n. 141).

¹⁷³ HC Deb. (n. 168).

¹⁷⁴ Coroners and Justice Act 2009, s. 55(3).

¹⁷⁵ *Ibid.*, s. 55(4).

¹⁷⁶ Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder: (1) Loss of Control' (n. 145).

words said.¹⁷⁷ A marked shift towards objectification has occurred throughout the new reforms: the trial judge can unilaterally remove the defence on the premise that no properly directed jury could reasonably conclude its applicability;¹⁷⁸ sexual infidelity is excluded;¹⁷⁹ incited, directed violence is outwith the new parameters;¹⁸⁰ and revenge is inconsistent with the ambit of the defence.¹⁸¹ Moreover, it is only personal characteristics, or rather circumstances of the defendant which *caused* them to have a sense of being seriously wronged (inculcated partially rightful anger) that are in a sense relevant.¹⁸² It is no longer necessary to consider other potentially applicable phenomenological aspects of loss of self-control such as grief, emotional distress, or sadness, but these conditions, if applicable at all, will be within the contextual ambit of diminished responsibility as redefined, and evaluated above.¹⁸³

A new definition is purveyed of the amorphous and inherently characterless Clapham omnibus driver in the context of loss of self-control as a partial defence. By s. 54(1)(c) it refers to a person of the defendant's sex and age with a normal degree of tolerance and self-restraint who, in the same circumstances as the defendant found himself in, *might* have acted in the same way or a similar way. Further, s. 54(3) allows the jury to consider *all circumstances* except those whose only relevance to the defendant's conduct is that they have a bearing on his general capacity for tolerance and self-restraint.

The new objective standardisation within s. 54 will have important resonances in novel applications to the intoxicated or mentally impaired killer. It is significant that the identifiable and particularised relevant characteristics of the accused (sex, age, tolerance and restraint) are conjoined together with explicit reference to *the circumstances of the defendant*.¹⁸⁴ The corollary of this momentum shift is presumptively a departure from primordial focus on gravity of provocation and capacity for self-control within the proclivities of internalised characteristics.¹⁸⁵ Modern reflection will instead relate to an accused's overarching circumstances as explanatory behaviour for loss of self-control attached to fear or anger.¹⁸⁶ Utilisation of prevailing 'circumstances' suggests an elongated consideration by jurors of cumulative 'personal history' of the defendant, or underlying events or episodes, and consequentially embracing organic brain disease, depressive illnesses, chronic alcoholism, personality disorders, or drug addiction. Excluded will be circumstances that *only* have relevance to an accused's general capacity for tolerance and self-restraint. It is unclear at this juncture how wide the spectrum of circumstances can be drawn in the context of transitory, as opposed to permanent events, such as temporary intoxication, recreational drug use or drug-related

177 Ibid., 284.

178 Coroners and Justice Act 2009, s. 54(6).

179 Ibid., s. 55(6)(c).

180 Ibid., s. 55(6).

181 Ibid., s. 54(4).

182 Ibid.

183 Ibid., s. 52.

184 See, generally, Amanda Clough, 'Loss of Self-Control as a Defence: The Key to Replacing Provocation' (2010) 74 Journal of Criminal Law 127; Susan Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74 Journal of Criminal Law 223; Miles (n. 84); and Carol Withey, 'Loss of Control' (2010) 174 Criminal Law and Justice Weekly 197.

185 For an excellent discussion of key reforms pertaining to sexual infidelity see Rudi Fortson QC, 'Homicide Reforms under the CAJA 2009' (Criminal Bar Association of England and Wales Seminar, October 2010) <http://www.rudifortson4law.co.uk/legaltexts/Homicide%20Offences_CBA_handout_for_16th_Oct2010_R_Fortson_submitted_v.7.pdf> (accessed 27 March 2011).

186 See Stanley Yeo, 'English Reform of Provocation and Diminished Responsibility: Whither Singapore?' (July, 2010) Singapore Journal of Legal Studies 177.

paranoia. The benefit of allowing circumstances to be evaluated in such a fashion, and underlying events or episodes, is that it obviates deeming it, 'as a characteristic by internalising it as some kind of syndrome or character flaw'.¹⁸⁷ This may allow enhanced hermeneutic consideration by fact-finders in an empathetic and sympathetic¹⁸⁸ manner, albeit that 'legitimate' provocative conduct itself has been constrained.

The new provisions omit any reference to the position where an accused acts in mistaken belief as to prevailing circumstances, and kills in excessive self-defence. In this regard the Law Commission explicitly stated that no need existed to 'supplement the common law in these cases'.¹⁸⁹ Difficulties may prevail within the first qualifying trigger, that of fear of serious violence. If the fear is irrationally based as a product of mental abnormality, where for instance a defendant kills under a paranoid delusion about threatening conduct by the victim, it is submitted that diminished responsibility, not provocation, is the appropriate defence and the post-*Holley* division is applicable.

Drunken mistaken belief arising from self-induced intoxication has proved troublesome at common law.¹⁹⁰ Voluntary intoxication can at best afford a defence only if it negatives the *mens rea* required of the offence:¹⁹¹ 'it is not the drunkenness that is supplying the exculpation ... it is the lack of *mens rea*'.¹⁹² For murder, intoxication will *only* be a defence if it means that the accused did not form the intention to kill or cause grievous bodily harm. A divide has been made between specific/basic intent crimes following *Majewski*¹⁹³ whereby lack of *mens rea* in the former run of cases may exculpate, but arguably voluntary intoxication provides inculpation in the latter as the defendants, 'evinced the level of culpability that the *mens rea* requirement is designed to track'.¹⁹⁴ Indeed, there are suggestions in *Majewski*¹⁹⁵ that the prosecution may be entitled to lead evidence of drunkenness in basic intent crimes (such as manslaughter) in substitution for proving the required *mens rea*. If the accused is indeed so drunk that he does not form the *mens rea* of a basic intent crime, the prosecution will be unable to establish the fault element for culpability. In such circumstances the prosecution should be entitled to prove that the accused did not form the *mens rea* for the offence, but that had he not been drunk he would have done so. This would achieve the same result as the US MPC, which provides, 'When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.'¹⁹⁶

The correlation between drunken mistaken belief and self-defence has arisen in English law in *O'Grady*,¹⁹⁷ *O'Connor*,¹⁹⁸ and more recently in *Hatton*.¹⁹⁹ A sober defendant is to be judged

187 Clough (n. 184) 124.

188 See, generally, Fortson QC (n. 185).

189 See Law Com. No 290, 2004 (n. 6) para. 3.160; and see *Letenock* (1917) 12 Cr App R 221.

190 See Finbarr McAuley, 'The Intoxication Defence in Criminal Law' (1997) 32 Irish Jurist 243.

191 See, generally, Paul Robinson, 'Causing the Conditions of One's Own Defences' (1985) 73 Virginia Law Review 1.

192 Simester (n. 11) 13: 'The criminal law does contain an intoxication defence, but it is a doctrine of inculpation, not exculpation'; and *ibid.*, 4.

193 *Majewski* (n. 11); and see, generally, Simon Gardner, 'The Importance of *Majewski*' (1984) 4 Oxford Journal of Legal Studies 279.

194 Simester (n. 11) 13.

195 *Majewski* (n. 11); see, generally, Jeremy Horder, 'Pleading Involuntary Lack of Capacity' (1993) 52 Cambridge Law Journal 298.

196 MPC (n. 90) §208.2.

197 [1987] QB 995.

198 [1991] Crim LR 135.

199 [2005] EWCA Crim 2951.

on the issue of justification on the facts he honestly believed to exist, however unreasonable his belief. Since murder is a crime of specific intent, may a drunken defendant plead that because he was drunk he mistakenly believed that circumstances existed requiring a need to defend himself with fatal force? A negative response has been elicited for the offences of murder (specific intent) and manslaughter (basic intent): 'where the jury are satisfied that the defendant was mistaken in his belief that any force or the force that he in fact used was necessary to defend himself and are further satisfied that the mistake was caused by voluntary induced intoxication, the defence must fail'.²⁰⁰ Common law principles in this regard have been replicated by s. 76(5) of the Criminal Justice and Immigration Act 2008.²⁰¹ It is submitted, despite the finality of earlier statements, that caution needs to be exercised in this regard when drunken mistakes, excessive force in self-defence and loss of self-control are intertwined. In murder, the specific intent is the intent to kill or cause grievous bodily harm and so the accused would be able to raise intoxication to show that he did not intend to kill or seriously injure a human being, but not to show that he believed he was acting in self-defence or that he believed the victim not to be within the Queen's Peace. It is postulated that, in the context of the Coroners and Justice Act qualifying trigger relating to 'fear' of serious violence, the position remains that voluntary intoxication is relevant in crimes of specific intent, but only in so far as it relates to the requirement of intention, rather than subjectivised mistaken beliefs in circumstances of justification.

Unreasonable mistaken belief induced by voluntary intoxication has arisen infrequently at common law in the US. An interesting point of comparison arose in the court of appeals decision in *State v. Mauricio*.²⁰² The accused, severely intoxicated at the time of the fatal act, killed the victim upon mistaking him for a nightclub bouncer with whom he had engaged in conflict earlier in the night, and from whom he feared violent repercussions. The Supreme Court of New Jersey found that the superior court had erred in failing to allow jury evaluation of the heat of passion defence: a self-induced unreasonable drunken mistake did not obviate consideration by fact-finders of a provocation defence.²⁰³ Interestingly, conflicting statements were delivered in *Howell v. State*,²⁰⁴ reflective of a preponderance of jurisdictions, wherein the court of appeals extrapolated that the concept of 'reasonableness' is inherently inconsistent with provocation, 'the existence of serious provocation must be determined through the eyes of a reasonable (and sober) person standing in the defendant's shoes', and in qualifying terminology that sober is 'here taken to mean that the reasonableness of one's determination of provocation is to be presumed unreasonable in the case that the determiner is intoxicated'.²⁰⁵

200 *O'Grady* (n. 197) 999 (Lord Lane CJ).

201 Section 76(5) of the Criminal Justice and Immigration Act 2008 provides that, 'subsection 4(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced'.

202 568 A 2d 879, 881 (NJ 1990). See, generally, Reid Griffith Fontaine, 'Adequate (Non) Provocation and Heat of Passion as Excuse Not Justification' (2009) 43 *University of Michigan Journal of Law Reform* 27; and Peter Western, 'How Not to Argue that Reasonable Provocation Is an Excuse' (2009) 43 *University of Michigan Journal of Law Reform* 175.

203 *Ibid.*, 887.

204 917 P2d, 1207.

205 *Ibid.*

Conclusion

This chapter has aimed to add further grist to the mill towards facilitation of appropriate treatment of the severely intoxicated and/or mentally abnormal offender who kills. The subject matter has been enervated by the novel classificatory system provided by the Coroners and Justice Act 2009, and comparative extirpation of reform and traditional states in the US. It is submitted that whatever schematic template is purveyed to partial defences to murder, whether in the contextual ambit of diminished responsibility or loss of self-control, it is fundamental that 'objectification', 'characterisation' and 'personification' of individual defendants reflect appropriate societal expectations and legitimate beliefs of attitudinal behaviours. The defence provided is only partial not full, and consequently allows a mitigating sentencing discretion. The concomitant of this partially excusatory framework is that any moral barometer standardisation needs to be reflective of appropriate gradations of rectitude and culpability. In a number of respects, as iterated, this barometer remains either ineffective or uncertain in regard to the chronic alcoholic or mentally abnormal killer.

Publication (ii)

(ii) 'Recognising Acute Intoxication as Diminished Responsibility? A Comparative Analysis' (2012) *Journal of Criminal Law* 76(1), 71-98.

Journal of Criminal Law

2012

Recognising acute intoxication as diminished responsibility? A comparative analysis?

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Subject: Criminal law

Keywords: Comparative law; Diminished responsibility; Intoxication; New South Wales; New Zealand; Scotland

Legislation: Homicide Act 1957 s.2

Coroners and Justice Act 2009 s.52

Criminal Justice and Licensing (Scotland) Act 2010 s.168

Crimes Amendment (Diminished Responsibility) Act 1997 (New South Wales)

Legal Aid, Sentencing and Punishment of Offenders Bill 2011

**J. Crim. L. 71 'J'ai le vin mauvais!'*¹

Abstract This article provides an analysis of the extent to which acute intoxication may or may not satisfy the 'recognised medical condition' requirement under s. 2 of the Homicide Act 1957, as amended by s. 52 of the Coroners and Justice Act 2009. It is argued that jurisprudential authorities clarifying the parameters of the 'recognised medical condition' requirement are urgently needed. In the interim period the importation of the novel terminology remains open to conjecture. The author argues that 'acute intoxication' *potentially* satisfies the revised plea and utilises the position adopted in Scotland, New South Wales and New Zealand to demonstrate this proposition. The latter jurisdiction has never had a formal diminished responsibility plea, although it has been identified that evidence of a defendant's mental abnormality was often used to reduce a murder conviction to one of voluntary manslaughter via the legal conduit of provocation. Following the demise of the provocation defence, however, issues pertaining to provocative conduct and/or a defendant's mental abnormality fall to be considered by the sentencing judge, but only in restricted circumstances. The recent implementation of a tripartite sentencing regime in New Zealand means that the alcohol-dependent and/or provoked defendant who kills will not have such mitigation considered if they have previously committed a qualifying offence under the scheme. The position in New Zealand is set against the Legal Aid, Sentencing and Punishment of Offenders Bill 2010-11 which proposes a 'two-strike' system for a variety of offences including voluntary manslaughter. It is submitted that this type of scheme has potentially significant consequences for the alcohol-dependent defendant who may not have had appropriate treatment for his mental abnormality following a first conviction.

Keywords Acute intoxication; Alcohol; Diminished responsibility; Manslaughter; Murder

**J. Crim. L. 72* The partial defence of diminished responsibility² was radically altered by s. 52 of the Coroners and Justice Act 2009,³ and fundamental reformulations became effective on 4 October 2010.⁴ The new provision was designed to align the mitigating doctrine with 'developments in diagnostic practice'.⁵ To raise the revised plea successfully, the defendant must now prove, on the balance of probabilities,⁶ that at the time of the killing he was suffering from an 'abnormality of mental functioning' arising from a 'recognised medical condition'.⁷ This definitional change 'may have more far-reaching consequences than initially anticipated'.⁸ The Royal College of Psychiatrists considered that the 'recognised medical condition' requirement would 'encourage reference within expert evidence to diagnosis in terms of one or two of the accepted internationally classificatory systems of mental disorders (WHO ICD10 and AMA DSM)'.⁹ Both the WHO ICD10 and AMA DSM identify several different mental and behavioural disorders arising from psychoactive substance **J. Crim. L. 73* use, including 'acute intoxication'.¹⁰ If the court approaches the 'recognised medical condition' requirement in line with the Royal College of Psychiatrists' interpretation, it would seem that extreme drunkenness could *potentially* satisfy the newly ordered partial defence.¹¹ This is clearly outwith the scope of traditional intoxication doctrine *per se* which establishes that voluntary intoxication does not

negate the defendant's criminal liability, save in the limited context of specific intent offences and operatively as a denial of the requisite *mens rea* at the time of the relevant act.¹² It has been identified that the '[l]aw and psychiatry are based on opposing paradigms, they cannot work together. Both claim to have a monopoly on understanding human behaviour but, paradoxically, appear to approach it from two different standpoints'.¹³ If acute intoxication satisfies the concessionary defence, this *potentially* undermines established criminal law principles on voluntary intoxication. New jurisprudential authorities embracing this reformatory defence are yet to reach English appellate courts. In the interim period the importation of the novel terminology remains open to conjecture.

This article considers the extent to which transient states of acute intoxication may or may not satisfy the requirements of the newly worded partial defence. It reviews the position adopted under the original s. 2 of the Homicide Act 1957 in cases involving the voluntarily intoxicated and mentally abnormal defendant and provides a fresh reappraisal in light of recent amendments introduced by s. 52 of the Coroners and Justice Act 2009. This analysis is supplemented by an in-depth consideration of the applicability of the diminished responsibility defence in Scotland, New South Wales and New Zealand. The approach adopted in these jurisdictions offers an invaluable insight into the potential ambit of the revised plea and more specifically the 'recognised medical condition' requirement.

This comparative analysis commences with a review of Scotland's recently codified diminished responsibility defence. The Scottish Law Commission noted that the mitigating doctrine may be read to include states of extreme drunkenness, since 'an intoxicated person is at the **J. Crim. L. 74* material time suffering from an abnormal state of mind'.¹⁴ Taking this suggestion into account, the Scottish executive deemed it appropriate to exclude intoxication *per se* from satisfying the partial defence, in order to preserve traditional intoxication doctrine.¹⁵ The author considers the extent to which 'acute intoxication' *may* satisfy the requirements of the revised s. 2 of the Homicide Act 1957 (which remains silent on the issue of voluntary intoxication) in light of the Scottish Law Commission's comments and Scotland's explicit exclusionary clause.

A consideration of the New South Wales position on 'acute intoxication' and its concessionary defence is also provided. Unlike the revised s. 2 of the Homicide Act 1957, states of extreme drunkenness are tacitly excluded from the New South Wales mitigation via the importation of an 'underlying condition' requirement, which mandates that at the time of the fatal act the defendant must have been suffering from 'a pre-existing mental or physiological condition other than of a transitory kind'.¹⁶ The corollary is that in the absence of an explicit or implied exclusionary clause pertaining to voluntary intoxication, states of acute intoxication could *potentially* satisfy the 'recognised medical condition' requirement in England and Wales. In practical terms, whether acute intoxication satisfies the 'recognised medical condition' requirement is likely to be determined by which of two or more medical experts are convincing before the jury. The testimony provided by medical experts for the defence and the Crown in the English courts is likely to direct attention to the severity of the defendant's condition¹⁷ and the stage of that disorder.¹⁸ The concessionary defence will remain 'in the hands of expert witnesses, whose sympathies understandably rest with defendants struggling with various mental states and the spectre of the mandatory life sentence'.¹⁹ The 'ultimate question', therefore, becomes a very onerous task for jurors who are required to 'base their decision on opinion which usually involves choosing between two differing views'.²⁰ Judge LJ has suggested that '... if the outcome of the trial depends exclusively or almost exclusively on a serious disagreement **J. Crim. L. 75* between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed'.²¹

The author also explores New Zealand's formal rejection of the diminished responsibility defence. Although an analysis of jurisprudential authorities reveal that the defence had been successfully argued under the guise of loss of self-control, the recent demise of the provocation defence appears to have closed the door to both the provoked and mentally abnormal defendant.²² The effect is to remove issues of provocative conduct and/or mental abnormality from the trial to the sentencing process. The trial judge is not in a position to substitute a murder conviction for one of manslaughter and as such there is a distinct possibility that the provoked and/or mentally abnormal defendant will be labelled a murderer. In addition, the recent enactment of the Sentencing and Parole Act 2010, dubbed 'one of the harshest criminal laws ever enacted', means that evidence of provocation and/or mental abnormality will only be relevant where it is the defendant's first serious offence.²³ Under the new regime, there is a real concern that the court will not be in a position to consider the defendant's mental abnormality at all.

Finally, the author assesses the potential impact of the Legal Aid, Sentencing and Punishment of Offenders Bill 2010-11 on the alcohol-dependent defendant. The Bill proposes a 'two-strike' regime

where a period of life imprisonment will be imposed where a defendant has committed two serious offences. The scheme may apply to those suffering from mental disorders including alcohol and drug dependence syndrome. It has been identified that more treatment needs to be provided to prisoners suffering from substance-use disorders. The current provision of treatment is often ineffective, and there is a high rate of reoffending amongst those suffering from addiction. The 'two-strike' regime potentially leaves the alcohol and/or narcotic-dependent defendant in a more vulnerable position than an offender who does not suffer any form of mental abnormality. Following an alcohol-dependent's first serious offence under the regime, it is likely that he will be imprisoned with offenders who do not suffer any form of abnormality. There is a real prospect that the alcoholic will not receive an appropriate level of treatment and will be more likely to reoffend upon release. If the defendant's second offence is regarded as serious, a sentence of life **J. Crim. L. 76* imprisonment may be imposed. Much can be learned from the position in New Zealand which is demonstrative of the problems associated with the imposition of arbitrary sentencing regimes.

Coroners and Justice Act 2009

The English Parliament made significant amendments to s. 2 of the Homicide Act 1957 by s. 52 of the Coroners and Justice Act 2009.²⁴ To raise the revised defence successfully, the defendant must now be shown to have been suffering from an 'abnormality of mental functioning', a term preferred in English law to 'abnormality of mind'.²⁵ As noted, this must have arisen from a 'recognised medical condition'.²⁶ The 'recognised medical condition' requirement is designed to 'encourage reference in expert evidence' to the World Health Organisation ICD-10.²⁷ The classificatory system recognises 'acute intoxication' and 'harmful use' as disorders of clinical significance.²⁸ The former is defined as 'a condition that follows administration of psychoactive substances resulting in disturbances in level of consciousness, cognition, affect or behaviour, or other psycho-physiological functions and responses'.²⁹ The latter is defined as 'a pattern of psychoactive substance use that is causing damage to health, for example, episodes of depressive disorder secondary to heavy consumption of alcohol'.³⁰ The English diminished responsibility defence 'remains silent as to levels of gradation of voluntary intoxication that may or may not constitute a "mental abnormality"' when a defendant kills while under the influence of alcohol or narcotics'.³¹ It is therefore, likely that medical experts will be required to provide evidence as to whether the defendant suffers from a disorder of clinical significance which is capable of satisfying the 'recognised medical condition' requirement.

The jury will be required to determine whether the 'recognised medical condition' substantially impairs the defendant's ability to: understand the nature of the defendant's conduct; form a rational **J. Crim. L. 77* judgement; or exercise self-control.³² The term 'substantial impairment' is one of few remnants of the original diminished responsibility plea. In this regard, it would seem that the court will continue to follow the ruling adumbrated in *R v Ramchurn*,³³ in which the Court of Appeal reflected that 'substantially impaired' within s. 2(1) of the Homicide Act 1957 meant something more than trivial, but less than total.³⁴ Presumably alcohol-related disorders will affect the defendant's level of self-control, although there may be cases which affect the defendant's ability to form a rational judgement.³⁵

Finally, fact-finders in the English court will be required to assess whether the mental abnormality provides an explanation for the killing.³⁶ The provision asserts that an explanation will be provided if 'it causes, or is a significant contributory factor in causing the person to carry out that conduct'.³⁷ This requirement has been heavily criticised and Chalmers notes that 'it is fortunate that it is not found in the Scottish legislation'.³⁸ It has been suggested that the causal element is likely 'to direct attention to the interaction of the medical condition with any other causal factor, such as alcohol consumption not stemming from the condition itself'.³⁹ For example, the causative effect of alcohol voluntarily consumed will not prevent the defendant's alcohol dependence syndrome from substantially impairing his mental capacity providing the disorder is a significant contributory factor in the killing. The distinction between a defendant's voluntarily intoxicated state and medical condition, however, may become irrelevant if acute intoxication is capable of satisfying the 'recognised medical condition' requirement under the reformed defence. Further interpretive guidance deciding the parameters of the 'recognised medical condition' limb in the context of voluntary intoxication is urgently required.

Criminal Justice and Licensing (Scotland) Act 2010

The problem explored above is unlikely to arise in Scotland, where the Scottish Parliament recently codified the diminished responsibility defence under s. 168 of the Criminal Justice and Licensing (Scotland) Act **J. Crim. L. 78* 2010.⁴⁰ The provision makes only minor modifications to the common

law formulation as propounded in *Galbraith v HM Advocate*,⁴¹ and specifically prevents acute intoxication *per se* from satisfying the requirements of the partial defence.⁴² The *Galbraith* court had concluded that the appropriate test for diminished responsibility was whether 'at the relevant time, the accused was suffering from an abnormality of mind which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts'.⁴³ The similarity across the *Galbraith* formulation and the original version of the English diminished responsibility plea is striking.⁴⁴ Under s. 2 of the Homicide Act 1957 the defendant was also required to prove an 'abnormality of mind'.⁴⁵ This requirement was slightly more restricted than its Scottish counterpart since the 'abnormality of mind' must have arisen 'from a condition of arrested or retarded development of mind or any inherent causes' or alternatively, it must have been 'induced by disease or injury'; the jury would be required to determine whether the abnormality of mind 'substantially impaired' the defendant's 'mental responsibility' for the killing.⁴⁶ The explicit invocation of the 'normal person' as a comparator in *Galbraith* was something that had been held to be implicit in s. 2 of the Homicide Act 1957 from its inception.⁴⁷

The most significant difference between the formulations elucidated above was that under the Scottish approach any abnormality arising from voluntary intoxication, or psychopathic personality disorder was explicitly precluded from satisfying the diminished responsibility plea.⁴⁸ The Court in *Brennan v HM Advocate*⁴⁹ had ruled that:

***J. Crim. L. 79** a person who voluntarily and deliberately consumes known intoxicants, including drink or drugs, of whatever quantity, for their intoxicating effects, whether these effects are fully foreseen or not, cannot rely on the resulting intoxication as the foundation of a special defence of ... diminished responsibility.⁵⁰

The Scottish Law Commission was concerned, however, that this exclusion might be misinterpreted and felt that the principle required further clarification by statute.⁵¹ The Commission considered the following four situations. The first is where the defendant kills while suffering from alcohol or drug dependence.⁵² These types of dependence syndrome are capable of giving rise to conditions which constitute diminished responsibility. The defendant would not necessarily be intoxicated at the time of the killing and, as such, the dictum in *Brennan* would not apply.⁵³

The second scenario arises 'where at the time of the killing the accused suffered from a mental abnormality within the scope of the plea and at the same time was drunk (in the sense of acute intoxication)'.⁵⁴ The Scottish Law Commission considered that the correct approach in such cases is to direct the jury to consider 'whether, despite the intoxication, the accused was suffering from an abnormality of mind which substantially impaired his ability to determine or control his conduct'.⁵⁵ It is the abnormality of mind, rather than the intoxication *per se*, which satisfies the partial defence.

The third circumstance exists where the defendant suffers from alcohol or drug dependence and was at the time of the killing intoxicated.⁵⁶ The Scottish Law Commission was of the view that 'the same solution should apply in this case as in any other where there is a combination of a qualifying condition and acute intoxication'.⁵⁷ In effect, it is the dependence syndrome that is to be taken into account for the purpose of the concessionary defence.

The final situation arises where the defendant is acutely intoxicated (voluntarily) but does not suffer from another mental abnormality. It is in this instance that the dichotomy in *Brennan* is 'directly applicable'.⁵⁸ The Scottish Law Commission considered that an explicit exclusionary clause was crucial to cover this type of case. The Law Commission conceded that the exclusion might appear unnecessary since:

... a transient state of intoxication would not fall within the test for diminished responsibility. However, such an interpretation is not in every sense an obvious one. An intoxicated person is at the time of intoxication ***J. Crim. L. 80** suffering from an abnormal state of mind which does affect his ability to determine or control his conduct. Accordingly the basis of the exclusion is not the definition of the plea but the clear policy of the criminal law, as set out in the *Brennan* decision, that voluntary intoxication does not elide criminal responsibility.⁵⁹

In light of the Scottish Law Commission's recommendation the intoxication exclusion stipulated in *Brennan* and reaffirmed in *Galbraith* is specifically maintained in s. 51B(3) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 168 of the Criminal Justice and Licensing (Scotland) Act 2010, which provides:

The fact that a person was under the influence of alcohol, drugs or any other substance at the time of

the conduct in question does not of itself--

- (a) constitute abnormality of mind for the purposes of ss. (1), or.
- (b) prevent such abnormality from being established for those purposes.

This provision is designed to prevent the acutely intoxicated defendant from successfully claiming diminished responsibility, unless that intoxication co-existed with an underlying medical condition.⁶⁰ The result is that voluntary intoxication (acute intoxication) *per se* will be insufficient to satisfy the diminished responsibility defence in Scotland. As such, the Scottish diminished responsibility plea remains open in restricted circumstances to the voluntarily intoxicated, but alcohol-dependent or mentally abnormal defendant.

Crimes Amendment (Diminished Responsibility) Act 1997 (NSW)

The divergence in approach between England and Scotland is perhaps surprising given that both the English Law Commission and the Scottish Law Commission⁶¹ considered tacitly excluding states of 'acute intoxication' via the imposition of an 'underlying medical condition' requirement akin to that in the Australian jurisdictions of New South Wales⁶² and the Northern Territory.⁶³ In its 2004 Report, the English Law Commission recommended that, in order to satisfy the concessionary defence, the defendant must establish an 'abnormality of mental **J. Crim. L. 81* functioning' arising from an 'underlying condition'.⁶⁴ The impact would have been to exclude transient states of voluntary intoxication from satisfying the requirements of the partial defence. Although this suggestion was omitted from its 2006 Report, the English Law Commission remained heavily influenced by the New South Wales formulation and, as such, the differences between s. 23A of the Crimes Amendment (Diminished Responsibility) Act 1997 and s. 52 of the Coroners and Justice Act 2009 are minimal.⁶⁵ The main deviation is that the New South Wales provision requires an 'abnormality of mind' arising from 'an underlying condition'.⁶⁶ As such, the New South Wales formulation makes it clear that although extreme drunkenness will never satisfy the requirements of the concessionary defence, it will not preclude the availability of diminished responsibility where the defendant suffers from a more permanent 'underlying condition'. In stark contrast, the English Law Commission considered that issues concerning the complex inter-relationship between the partial defence and acute intoxication could be resolved by appropriate 'judicial development'.⁶⁷

Common law developments in England

In a trilogy of cases, prior to the enactment of the Coroners and Justice Act 2009, both the House of Lords and the Court of Appeal had the opportunity to review the concessionary defence in light of traditional intoxication doctrine. Initial debate concentrated on whether voluntary intoxication should preclude the partial defence to a mentally abnormal defendant,⁶⁸ with intoxication *per se* correspondingly stigmatised as **J. Crim. L. 82* potentially introducing an inculpatory fault element.⁶⁹ More recently, deliberations have focused upon whether alcohol dependence syndrome could independently constitute an abnormality of mind and exist as a bespoke qualifying condition.⁷⁰ In the first of the three cases, the House of Lords was required to reconcile and separate coterminous issues of depression and intoxication. The House of Lords, in *R v Dietschmann*, considered that the central focus in such cases should be on the underlying mental abnormality distilled from the intoxication. Lord Hutton identified that the issue was not whether the defendant would have carried out the killing in the absence of intoxication, but whether, if he did kill, he killed under diminished responsibility. Lord Hutton considered the correct analysis to apply in such cases:

Assuming that the defence have established that [D] was suffering from mental abnormality as described in s 2, the important question is: did the abnormality substantially impair his mental responsibility for his acts in doing the killing? ... Drink cannot be taken into account as something which contributed to his mental abnormality and any impairment of mental responsibility arising from that abnormality. But you may take the view that both [D's] mental responsibility and drink played a part in impairing his mental responsibility for the killing and that he might not have killed had he not taken drink. If you take that view, then the question for you to decide is this: has D satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or has he failed to satisfy you of that? If he has satisfied you of that, you will find him not guilty of murder but you may find him guilty of manslaughter. If he has not satisfied you of that, the defence of diminished responsibility is not available to him.⁷¹

The ruling identified that a defendant's voluntary consumption of alcohol would not preclude the diminished responsibility defence. Instead, attention should be directed to the defendant's mental abnormality and if the abnormality was a substantial cause (not the sole cause) of the killing the concessionary defence would be satisfied. In effect, Lord Hutton directed the jury to ignore the effects of the alcohol that the defendant had voluntarily consumed. As Simester and Sullivan identified:

[t]he drink does not supervene over the underlying subnormality. That underlying condition remains, and so does the question whether the condition substantially impaired his responsibility for the killing.⁷²

The ruling in *Dietschmann* clearly influenced the Scottish Law Commission's Report and it is anticipated that s. 51(B) of the Criminal Procedure (Scotland) Act 1995, as inserted by the Criminal Justice and Licensing (Scotland) Act 2010, will be interpreted in line with Lord **J. Crim. L. 83* Hutton's judgment. The combined effect of an underlying mental abnormality, which was not inextricably linked to alcohol or drugs, and voluntarily induced intoxication had also been considered in *HM Advocate v Liam Thomas McLeod*.⁷³ In *McLeod*, it was alleged that the defendant, who had voluntarily inhaled butane gas prior to the killing, suffered from post-traumatic stress disorder (PTSD). Lord Drummond Young advocated that the diminished responsibility defence would be satisfied if it was established that the defendant's abnormality of mind (i.e. PTSD) was 'a substantial cause' of his actions. In considering the combined effect of the defendant's intoxication and PTSD, the jury were directed as follows: if the inhalation of butane gas was the sole substantial cause of the defendant's actions, the partial defence would fail; if the PTSD was the sole substantial cause, the partial defence would be satisfied; if both the intoxication and the abnormality of mind contributed to the defendant's actions, the test was whether the PTSD was a substantial cause of the fatal act. Lord Drummond Young noted that the defendant's abnormality of mind 'needn't be the only cause. It needn't even be the main or predominant cause. It is sufficient if it is a substantial cause'.⁷⁴

Chalmers and Leverick have asserted that the *McLeod* approach is 'unnecessarily complex', noting that it would be preferable to ask the 'jury to consider whether--leaving the effects of intoxication out of account--the underlying condition is, in itself, sufficient to meet the requirements of the plea'.⁷⁵ The problems associated with requiring a causative connection between a defendant's mental abnormality and the killing are well documented. In 2004, the Law Commission recommended that for the purpose of the diminished responsibility defence a defendant's abnormality must be a 'significant cause' of the killing.⁷⁶ The rationale for this explicit requirement appears to be that there ought to be 'some connection between the condition and the killing in order for the defence to be justified'.⁷⁷ Criminal law scholars, together with the Royal College of Psychiatrists, specifically advised against the creation of 'a situation in which experts might be called on to "demonstrate" causation on a scientific basis'.⁷⁸ Notwithstanding, the revised defence in England requires that the abnormality 'causes, or is a significant contributory factor in causing the' defendant to kill.

The cases of *Dietschmann* and *McLeod* did not explicitly consider the approach the courts should adopt where the defendant suffers from an alcohol or drug dependence and is intoxicated at the time of the killing. Casey has suggested that Lord Drummond Young, in *McLeod*, 'appeared **J. Crim. L. 84* to imply that a self-induced mental abnormality caused by the taking of drink or drugs would not satisfy the diminished responsibility test'.⁷⁹ In an *obiter* statement, Lord Drummond Young commented:

... to the extent that PTSD may have caused the accused to get into the habit of butane gas intoxication, that is not relevant to the defence of diminished responsibility ...⁸⁰

The reference to habitual drug use in the statement appears to relate to dependence syndromes. If Lord Drummond Young intended to preclude the concessionary defence to the alcohol or drug-dependent defendant his view represents a significant departure from earlier decisions made in the Scottish courts.⁸¹ The ruling is also at odds with the decision in *Dietschmann*, which effectively removed the juridical bar that had prevented some alcohol-dependent defendants from claiming the partial defence in the English courts.⁸² Section 51B(3) of the Criminal Procedure (Scotland) Act 1995 appears to be more closely in line with the rulings in *Dietschmann* and *Wood* rather than the *obiter* statement of Lord Drummond Young in *McLeod*.

The Court of Appeal, in *Wood*, was required to apply the *ratio* in *Dietschmann* to the alcohol-dependent defendant who killed whilst voluntarily intoxicated. The defendant was a chronic alcoholic and had killed the victim who allegedly made unwanted homosexual advances. The defendant had been drinking heavily for 36 hours prior to the fatal act. Medical experts called for the

defence and the Crown were in unanimity vis-à-vis the nature and level of the defendant's alcohol dependence syndrome. Although the defendant had not suffered brain damage as a result, he manifested at least six of the symptoms identified by the ICD-10 criteria for alcohol dependence syndrome.⁸³ The trial judge, in light of earlier authorities,⁸⁴ struggled with the concept of an intoxicated defendant being afforded the partial defence and advocated that the alcohol dependence syndrome would only be relevant if the defendant suffered brain damage or, alternatively, if every drink consumed on the day of the killing was truly involuntary.⁸⁵ This direction **J. Crim. L. 85* was in line with the earlier, and much-criticised, ruling in *Tandy*,⁸⁶ which had effectively accepted 'the doctrine of diminished responsibility as it applies to alcoholism only in terms of black and white rather than shades of grey: either the defendant was wholly incapable of resisting the impulse to drink or she was responsible for her actions and should be convicted of murder'.⁸⁷ The trial judge's directions in both *Wood* and *Tandy* required that the defendant 'conform to a model of alcoholism that even the most hardened, alcoholic would find difficult to meet', and were clearly inconsistent with the House of Lords ruling in *Dietschmann*.⁸⁸ Unsurprisingly, the Court of Appeal in *Wood* considered that the House of Lords decision in *Dietschmann* required 'a reassessment' of the way in which *Tandy* had been applied in the context of alcohol dependence syndrome where observable brain damage had not occurred.⁸⁹ No requirement existed for brain damage to have resulted from alcohol dependence syndrome, but fact-finders could still evaluate whether the extent and nature of the syndrome met the abnormality of mind threshold. In future cases the court would be required to, 'focus exclusively on the effect of alcohol consumed by the defendant as a *direct result* of his illness or disease and ignore the effect of any alcohol consumed voluntarily'.⁹⁰

The revised test received further clarification in *Stewart*.⁹¹ The Court of Appeal noted that the excessive consumption of alcohol could reduce murder to manslaughter:

[F]irst, where the effect of the intoxication was so extreme that the prosecution had failed to prove the necessary intention to kill or cause grievous bodily harm; And, second, assuming that the necessary intention was provided notwithstanding the consumption of alcohol, on the basis of diminished responsibility.⁹²

In determining whether the alcohol dependence syndrome had substantially impaired the defendant's mental responsibility, the court in *Stewart* provided an additional list of factors which should be considered by the jury. These include: (a) the extent and seriousness of the defendant's dependence, if any, on alcohol; (b) the extent to which his ability to control his drinking or to choose whether to drink or not, was reduced; (c) whether he was capable of abstinence from alcohol, and, if so; (d) for how long; and (e) whether he was choosing for some particular reason to drink more than usual.⁹³ The directions ask the jury to apply their common sense in determining whether the defendant's responsibility for the killing was substantially impaired.⁹⁴

This series of English cases demonstrates that prior to recent legislative enactments the partial defence remained available in restricted **J. Crim. L. 86* circumstances to the defendant suffering from a mental abnormality who was also acutely intoxicated at the time of the fatal act. It is expected that the rulings in *Dietschmann*, *Wood* and *Stewart* will remain authoritative under the revised s. 2 of the Homicide Act 1957.⁹⁵ It is unclear, however, how the 'recognised medical condition' requirement will affect cases of this type. If acute intoxication falls within the parameters of this limb of the partial defence, the jury will be required to consider whether that condition was a substantial cause of the defendant's conduct. This would presumably erode the mental abnormality/voluntary intoxication distinction made in such cases. Although Rudi Fortson QC has identified that it 'cannot be taken as a foregone conclusion that the courts will not exclude conditions that are merely temporary or transient', it is clear that the limits of this aspect of the provision will require clarification by the courts.⁹⁶

In light of the problems associated with the mitigating doctrine it is perhaps unsurprising that 'the appropriateness of diminished responsibility as a partial defence has been questioned'.⁹⁷ It has been suggested that the rationale for retaining the defence is to circumvent the mandatory life sentence for murder and to afford the sentencing judge the unfettered discretion that a manslaughter verdict allows. The Law Commission stated that opinion was divided on the issue of retention if the mandatory life sentence were abolished. It was noted that of the 68 respondents who 'directly expressed' an opinion, '44 favoured retention of the defence regardless of whether or not the mandatory sentence were to be abolished'.⁹⁸ The Scottish Law Commission also favoured retention of the partial defence in this context, and the concessionary defence survived beyond abolition of the mandatory life sentence in New South Wales.⁹⁹ The New South Wales Law Reform Commission noted that the role of the jury in assessing culpability in diminished responsibility cases is invaluable.¹⁰⁰ In the absence of the diminished responsibility defence, relative culpability in murder cases would

vest in the powers of the sentencing judge.¹⁰¹ The mitigating doctrine is also required to allow the law to distinguish between those killings which should be labelled as voluntary manslaughter rather than murder. In **J. Crim. L. 87* this regard, the sentencing process is not sufficiently adequate to compensate for the absence of a diminished responsibility defence. Despite these concerns, the problems associated with the concessionary defence have meant that certain jurisdictions have rejected the diminished responsibility plea outright.

New Zealand's formal rejection of the diminished responsibility defence

New Zealand, unlike the aforementioned jurisdictions, has never had an official diminished responsibility plea, despite strong arguments in favour of the partial defence.¹⁰² Significantly, the New Zealand Parliament favoured abolishing the mandatory life sentence for murder in preference to enacting a formal diminished responsibility plea.¹⁰³ The Law Commission of New Zealand emphasised the criticisms levelled at the English version of the partial defence, and concluded that a defendant's diminished responsibility was better considered in sentencing.¹⁰⁴ The result is that, in New Zealand, a defendant's mental abnormality will exist as a question of sentencing for the trial judge, but only in limited circumstances. Under the Sentencing and Parole Act 2010, the trial judge will only be able to consider the defendant's 'diminished intellectual capacity' in sentencing if the homicide is the defendant's first serious offence.¹⁰⁵ The discretion afforded to the trial judge in these circumstances remains subject to a very strong presumption of life imprisonment.¹⁰⁶ The result is that a defendant's mental abnormality will often be irrelevant at trial and inadmissible during sentencing.

It is true that a *de facto* form of diminished responsibility enjoyed a short period of gestation in the New Zealand courts via the provocation defence; however, 'the future relevance' of that 'body of case law is doubtful' post abolition of the latter.¹⁰⁷ In 1976, the New Zealand Criminal Law Reform Committee recommended abolition of the provocation defence and suggested that provocative conduct should instead fall within the ambit of the sentencing process.¹⁰⁸ The New Zealand Law Commission also called for abolition of the partial defence in its 2001 and 2007 reports.¹⁰⁹ The Commission rebuffed Law Society claims that the provocation defence was necessary to allow the jury to distinguish **J. Crim. L. 88* between degrees of murder, arguing that aggravating and mitigating factors could be considered by the trial judge. However, it was the vituperative public debate following the controversial case of *R v Weatherston*,¹¹⁰ which marked the eventual demise of the concessionary defence in November 2009.¹¹¹

Clayton Weatherston, a 33-year-old lecturer from Otago University, claimed that he was 'guilty of manslaughter, but not guilty of murder' when charged with the murder of his ex-girlfriend and former student, Sophie Elliott. Weatherston had visited the victim's parental home armed with a large kitchen knife. He proceeded to lock himself and the victim in her bedroom, before fatally stabbing and cutting her 216 times. The victim's mother heard her daughter's frightened screams, but was unable to unlock the bedroom door. When police arrived, Weatherston calmly admitted killing the victim but claimed it was because of 'the emotional pain that she [had] caused [him] over the past year'.¹¹² At his trial, Weatherston's plea of provocation was that the victim had become violent and angry when he questioned her as to whether he should have an STD test as a result of her having had casual sex with a man while on a recent trip to Australia.¹¹³ According to his evidence, the victim swore at him and made insults about his family, before lunging at him with a pair of scissors causing his glasses to fall off.¹¹⁴ Thereupon he lost his self-control and killed her. The defence argued that the defendant's 'vulnerability without glasses because of poor eyesight' should be considered when assessing his power of self-control.¹¹⁵ Weatherston also claimed that his complex psychological constitution which included elements of anxiety disorder, narcissism, obsessionality and histrionic and borderline personality traits should also be considered.¹¹⁶ The concessionary defence was rejected by the jury and he was subsequently sentenced to life imprisonment of which he must serve a minimum of 18 years without parole.

The trial took place in a 'blaze of publicity'.¹¹⁷ Weatherston's televised testimony which spanned seven days was branded a 'national disgrace' by Women's Refuge.¹¹⁸ There was a prevailing view that Weatherston's 'use of the provocation defence to put Sophie Elliott on trial was not right'.¹¹⁹ The defence led evidence that the victim had a 'propensity to **J. Crim. L. 89* fling insults "if she felt like it" and to "resort to violence if she felt pushed to frustration over relationship issues".¹²⁰ The defence poured over extracts from the victim's diary, where she had described attacking a previous boyfriend following a series of insults.¹²¹ Weatherston also relied on evidence that the victim had smashed a door at his (Weatherston's) flat in a demonstration of grievance and anger.¹²² The nature of the evidence led at trial and Weatherston's apparent lack of remorse meant that the public 'grew to

"despise" Clayton Weatherston'.¹²³ Heather Henare (Women's Refuge, Chief Executive) stated, 'this trial turned justice inside out--the killer became the victim and Sophie Elliott was portrayed to us all as he chose to describe her'.¹²⁴ Subsequently, Justice Minister, Simon Power, called for the defence's abolition contending that the defence '... wrongly enables defendants to besmirch the character of victims, and effectively rewards a lack of self-control'.¹²⁵

On 24 November 2009, the House of Representatives voted 116:5 in favour of the Crimes (Provocation Repeal) Amendment Act 2009. The effect was to transfer issues pertaining to provocative conduct to the sentencing judge. This reactionary response to the Weatherston trial has been the subject of acerbic criticism. Barrister Ron Mansfield of the Auckland Bar remarked that 'shifting the "provocation defence" to a "sentencing issue" would not work'.¹²⁶ Tolmie identified that, despite the problems associated with the concessionary defence, 'there are cases where a person has killed in response to ... circumstances that are so horrible that most people would not want to label the person a "murderer" and would not want them to serve life imprisonment'.¹²⁷ Provocation has been described as an "important and compassionate" part of the legal system in a "reactionary period" during which society is lacking "soul, spirit and compassion".¹²⁸ Tolmie recounts the case of a doctor who successfully raised the provocation defence after he eventually 'snapped in response to his mother begging for relief from the pain of the final stages of her terminal bowel cancer and sped up her eventual **J. Crim. L. 90* death'.¹²⁹ Peter Williams QC described the case of an alcohol-dependent defendant who he had previously defended. The man's wife had left him, taking their six children. He began to drink and lost his job as a result of his alcoholism. He subsequently lost his self-control and shot his wife as she was leaving a hotel bar. Williams observed that the defendant had lost everything that he valued in life and he argues that it is cases of this nature which 'cry out for a reduced sentence' and require a lesser verdict of voluntary manslaughter.¹³⁰ The abolition of the provocation defence means that it is likely that in future cases such defendants will be labelled murderers and be subject to the applicable three-stage sentencing regime.¹³¹

The Supreme Court denied Weatherston leave to appeal earlier this year. Defence claimed that an interview in the media had prejudiced Weatherston's right to a fair trial. It has been suggested that this 'concludes the widely publicised saga that had prompted the abolition of the provocation defence in New Zealand's criminal law'.¹³² The effect of the formal repeal of provocation, however, has also effectively closed the door to the mentally abnormal defendant. A number of jurisprudential authorities in New Zealand reveal that some defendants, by sleight of hand, framed their defence as tangentially related to excusable loss of control dependent upon different factorisations.

Although New Zealand has never formally recognised the diminished responsibility defence, issues pertaining to the defendant's state of mind were often a major factor in provocation trials. In *R v Ashton*,¹³³ for example, the trial judge acknowledged that the defendant's mental abnormality (paranoia) was a significant contributory factor in the commission of the offence. The court in *R v McCarthy*¹³⁴ considered that an 'inevitable and deliberate effect of the statutory changes embodied in s 169 of the Crimes Act 1961' was that diminished responsibility could fall within the purview of the provocation defence.¹³⁵ Accordingly, New Zealand's recent repudiation of the partial defence means that both the provoked defendant and the mentally abnormal killer will have their 'relative culpability' assessed by a trial judge, who will not have the jurisdiction to substitute a murder verdict with one of manslaughter.¹³⁶ This is fundamentally at odds with principles of fair labelling. As Orchard **J. Crim. L. 91* contended, the stigma attached to the offence of murder should not be imposed on those who kill because they are provoked.¹³⁷ By failing to differentiate between those who kill because of some form of mental abnormality or in response to a loss of self-control, and those who kill in cold blood, the law is at risk of losing its moral credibility.¹³⁸ The partial defences of provocation (loss of control) and diminished responsibility play a vital role in this regard, since they have the 'unique effect of altering a charge of murder to one of manslaughter'.¹³⁹

This issue is exacerbated by the restrictive sentencing policies that were introduced by the Sentencing and Parole Act 2010. The provisions introduced a tripartite system under which stricter penalties are imposed upon repeat offenders, and in some instances the trial judge is prohibited from considering mitigation in sentencing.¹⁴⁰ Where a defendant is convicted of an offence under s. 86A of the Sentencing Act 2002, a first warning is issued.¹⁴¹ If the offender is subsequently convicted of a s. 86A offence, a final warning will be issued and parole will be prohibited if a custodial sentence is imposed.¹⁴² A third offence under the provision will attract the maximum penalty for that crime and the defendant will be ineligible for parole, unless the court is satisfied that such a sentence would be 'manifestly unjust'.¹⁴³ It is worthy of note that the 'manifestly **J. Crim. L. 92* unjust' rule applies only to the defendant's ineligibility for parole, not the imposition of the maximum sentence for the offence charged.¹⁴⁴

Following the abolition of the provocation defence, and in the absence of a formal diminished responsibility plea, it is unlikely that the alcohol-dependent killer will be found guilty of manslaughter unless the prosecution are unable to establish the requisite *mens rea* for murder. In this respect, the treatment of the alcohol-dependent defendant under the new regime is particularly harsh. Under the amendments introduced by the Sentencing and Parole Act 2010, the trial judge will only be able to consider the defendant's 'diminished intellectual capacity' in sentencing if the homicide is the defendant's first serious offence.¹⁴⁵ Labour Representative, Grant Robertson, has contended that in this respect, the provision is 'unworkable, unjust and inequitable'.¹⁴⁶ In cases involving the voluntarily intoxicated defendant, s. 9 of the Sentencing Act 2002 specifically excludes the effects of voluntary intoxication from consideration during sentencing.¹⁴⁷ In light of this, acute intoxication will have no bearing on the sentence imposed, whether or not it is the defendant's first serious offence. Acute intoxication will only be relevant if the defendant's condition prevented him from manifesting the requisite intention for murder.¹⁴⁸ As Rumbles identifies, however, 'it is incredibly rare for intoxication to be successfully argued in this way'.¹⁴⁹

If the alcoholic killer is convicted of murder, there is a presumption that a sentence of life imprisonment will be imposed.¹⁵⁰ If a life sentence is imposed, the defendant must serve a minimum of 10 years (or 17 years, if the murder was aggravated¹⁵¹), unless that sentence would be ***J. Crim. L. 93** 'manifestly unjust'.¹⁵² Under s. 24 of the Sentencing Act 2002, the defence and prosecution will be able to consider and/or introduce mitigating and aggravating facts at 'disputed fact' hearings in a bid to persuade the court that those facts justify the imposition of a greater or lesser sentence for the offence charged. In light of the particularly harsh sentencing regime embraced in New Zealand, it is likely that these hearings will be long and complex. The New Zealand Ministry of Justice has also asserted that 'a sentence of less than life imprisonment' will only be substituted in 'a limited number of murder' cases where 'significant mitigating factors' exist.¹⁵³ If the sentencing judge decides to impose a lesser sentence, he must provide 'written reasons' for doing so.¹⁵⁴

Where murder is the defendant's second- or third-stage offence, the court must impose a sentence of life imprisonment without parole.¹⁵⁵ If the no-parole period is regarded as 'manifestly unjust', and it is the defendant's second-stage offence, the court can impose a life sentence of which the defendant must serve a minimum of 10 years (or 17 years, if the murder was aggravated).¹⁵⁶ If the court regards a sentence of life imprisonment without parole for the defendant's third-stage offence 'manifestly unjust', the sentencing judge must impose life imprisonment with a minimum non-parole period of 20 years. If the court considers that this non-parole period is 'manifestly unjust', the sentencing judge may reduce the minimum period to 10 years (or 17 years, if the murder was aggravated).¹⁵⁷ Brookbanks has asserted that the scheme becomes 'especially disturbing ... once a second- or third-stage has been triggered' because '[e]vidence of gross provocation, diminished responsibility or serious impulse control disorder will have no bearing whatsoever on the penalty that must be imposed by the court'.¹⁵⁸

***J. Crim. L. 94** The approach adopted in New Zealand raises questions about appropriate sentencing and labelling in homicide cases. In light of the Sentencing and Parole Act 2010, there is a real prospect that the mentally abnormal killer will face life imprisonment. New Zealand's lack of a partial defence also renders it more likely that the alcohol-dependent defendant will be labelled a murderer. As Mansfield observed:

Murder should be broken down to various levels or degrees of the crime. The levels or degrees of the crime should acknowledge an offender's actual culpability in the killing and the reality of the various forms of diminished responsibility that may exist.¹⁵⁹

The abolition of the provocation defence has effectively removed evidence of provocative conduct on behalf of the victim and/or mental abnormality on the part of the defendant from the trial process and transplanted it within the sentencing process. It is likely that 'disputed fact' hearings will render the sentencing process as lengthy as the trial process. Unlike the position in England, New South Wales and Scotland, however, the jury will not be charged to consider the defendant's mental abnormality and the trial judge will not be in a position to substitute a murder conviction with one of manslaughter. In practice, requiring a jury to determine guilt and expecting the judge to consider mitigating factors in such cases may cause confusion because 'the judge and the jury may have different views as to the basis for the conviction'.¹⁶⁰ The role of the jury is designed to represent societal views; provocation trials often involve 'issues that jurors can envisage--we can all be brought to breaking point'.¹⁶¹ It is the jury who should decide the 'appropriate level or degree of the crime and the judge then sentence accordingly'.¹⁶² The tripartite regime also precludes consideration of provocation and/or diminished responsibility where the murder charge is the defendant's second- or third-stage offence. The scheme

effectively 'authorizes the imposition of arbitrary and disproportionate sentences simply because the offender has a previous (albeit not necessarily serious) qualifying conviction'.¹⁶³

Legal Aid, Punishment and Sentencing of Offenders Bill 2010-11

At a more general level, the position in New Zealand emphasises the problems associated with the imposition of a restrictive sentencing regime which severely limits the powers traditionally afforded to the trial judge during the sentencing process. It is concerning that parallels may be drawn (albeit limited) across the Sentencing and Parole Act 2010 and the Legal Aid, Punishment and Sentencing of Offenders Bill 2010-11, which the UK government brought before the House of Lords on 4 November 2011. One of the key proposals under the new Bill is the **J. Crim. L. 95* imposition of a life sentence for a second serious listed offence¹⁶⁴ where the defendant is over 18, provided that certain key conditions have been met.¹⁶⁵ Schedule 16 to the Bill would introduce a new list of 44 serious offences, including manslaughter, into the Criminal Justice Act 2003. In order to impose a life sentence the court would need to consider that 'the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for 10 years or more'.¹⁶⁶ The defendant's previous offence would also need to fall within the list of offences introduced by Sched. 16 and 'a relevant life sentence or a relevant sentence of imprisonment or detention for a determinate period' would need to have been 'imposed on the offender for the previous offence'.¹⁶⁷ If these conditions are met the court would have to impose a sentence of imprisonment for life unless the circumstances 'relate the offence to the previous offence' or 'would make it unjust to do so'.

The Secretary of State for Justice, Kenneth Clarke, has stated that the regime would apply to defendants who had committed two 'probably near-murderous attacks' and he anticipates that it will affect approximately 20 cases per year.¹⁶⁸ He contends that, '[t]he new regime will restore clarity, coherence and common sense to sentencing and give victims a clearer understanding of how long offenders will actually serve in prison'.¹⁶⁹ Ashworth notes that these principles are essential to criminal law 'insofar as they conduce to predictability, consistency and accountability in decision-making'.¹⁷⁰ Nevertheless, 'consistency is only of benefit if it aligns with the inherent legal concept of fairness, particularly in terms of procedure, labelling and disposal',¹⁷¹ and 'rare' and 'exceptional cases' may arise where the imposition of the mandatory sentence is inappropriate.¹⁷²

There is a high rate of reoffending amongst those suffering from substance-use disorders, and research suggests that there is a 'yawning gap between the level of offender addiction, and treatment availability in UK prisons'.¹⁷³ The Chief Executive for the Rehabilitation of Addicted Prisoners Trust (RAPt) acknowledged that '[a]lcohol addiction is a huge **J. Crim. L. 96* unmet need in prisons'.¹⁷⁴ The 'two-strike' scheme will potentially have a significant impact on the alcohol-dependent defendant who may not have had an appropriate level of treatment while incarcerated following a serious offence under the scheme. Lord Ramsbotham, a former chief inspector of prisons, stated that this type of prisoner 'should be held in conditions similar to those in secure mental health hospitals'.¹⁷⁵ Although treatment is in some instances made available to those with substance-related disorders, there has been very little systematic analysis of the support offered and its effectiveness.¹⁷⁶ In many instances treatment has been regarded as ineffective and alcohol and drug-dependent defendants will often reoffend within 12 months of their release.¹⁷⁷ It is too early to assess the potential impact that these divisive reform measures will have upon the alcohol-dependent defendant, but it would seem that the arbitrary imposition of mandatory sentences is apt to cause injustice.¹⁷⁸

Conclusion

The revised s. 2 of the Homicide Act 1957 and the provisions of the Legal Aid, Punishment and Sentencing of Offenders Bill 2010-11 have potentially far-reaching consequences for defendants suffering from substance use disorders. It is apparent that states of acute intoxication *may* satisfy the 'recognised medical condition' requirement which has become an integral part of the diminished responsibility plea in England and Wales. This assumption is supported by the position adopted in Scotland and New South Wales, where voluntary intoxication and transient states respectively are statutorily excluded from satisfying the concessionary defence. The reformulated provision *potentially* opens the door to defendants who would not previously have been able to rely on their voluntarily induced state of intoxication to reduce a murder conviction to one of manslaughter, namely, those defendants who commit the *actus reus* with the relevant *mens rea*.

This is a significant departure from the traditional intoxication doctrine which establishes that voluntary intoxication is only relevant where it prevents the defendant from formulating the *mens rea* for a specific intent offence. It also demonstrates a marked shift from the position adopted in *Dietschmann*, where the jury was required to focus **J. Crim. L. 97* primarily on the defendant's depressive condition rather than his voluntarily induced state of intoxication. If acute intoxication *per se* is capable of satisfying the 'recognised medical condition' requirement, the court will no longer need to distinguish between voluntary intoxication and other mental abnormalities for the purpose of the concessionary defence. Of course, some medical experts might argue that although 'acute intoxication' constitutes a disorder of clinical significance, it does not amount to a 'recognised medical condition' in the same way that dependence syndromes do. If, however, the jury are satisfied that 'acute intoxication' meets the 'recognised medical condition' requirement the defence must then prove that the defendant's ability to form a rational judgement, etc. was substantially impaired.

It might be argued that *prima facie* expanding the palliative defence to include acute intoxication should render it easier for the alcohol-dependent defendant to claim diminished responsibility successfully. There is a real concern, however, that the importation of this lower threshold test for substance use disorders may have the opposite effect. It has often been said that judges and lawyers do not 'understand the concept of alcoholism as a disease'.¹⁷⁹ For many, substance use disorders have a greater 'kinship with self-indulgence than disease' and it is not uncommon for the layperson to query the appropriateness of the availability of the partial defence to the alcohol-dependent defendant.¹⁸⁰ In cases where the jury is unsure of whether the defendant is suffering from alcohol dependence syndrome or was simply acutely intoxicated at the time of the killing, will they be more or less likely to believe that the defendant's condition substantially impaired his ability to form a rational judgement? The trial judge will need to provide very careful directions in relation to this aspect of the provision in order to avoid misdirection as far as acute intoxication is concerned. We wait with bated breath for new jurisprudential authorities clarifying the parameters of the 'recognised medical condition' element of the new plea.

The recent repeal of the provocation defence in New Zealand effectively prevents the alcohol-dependent defendant from raising issues of diminished responsibility at trial. The effect is to transfer issues of provocative conduct and/or diminished intellectual capacity to the sentencing judge who does not have the jurisdiction to reflect a defendant's reduced culpability with a verdict of manslaughter rather than murder. Significantly, the new tripartite sentencing regime operating in New Zealand means that a defendant's alcohol dependence syndrome will not be relevant if it is the defendant's second or third offence under the scheme. Where the defendant's first qualifying offence is murder, there is a presumption that a sentence of life imprisonment will be imposed and alcohol dependence syndrome will only be relevant when considering parole eligibility. There is a real possibility that the alcohol-dependent defendant will be convicted of murder and sentenced to life **J. Crim. L. 98* imprisonment under the new scheme. In terms of the acute intoxication/dependence syndrome delineation the sentencing judge will still be required to distinguish between those conditions since evidence of voluntary intoxication is not relevant at the sentencing stage. By transferring issues of provocative conduct and/or diminished responsibility from the trial to the sentencing process the length of the trial has been shortened but only at the expense of extending and complicating sentencing procedures.

The position in New Zealand is demonstrative of the difficulties associated with the imposition of arbitrary sentencing regimes. It is well documented that '[t]he rigid mandatory term for murder [in England and Wales] has long been a problem'.¹⁸¹ Despite this, the Legal Aid, Punishment and Sentencing of Offenders Bill 2010-11 proposes the imposition of a mandatory life sentence for defendants who commit two serious offences under the scheme. In a controversial statement, Kenneth Clarke told BBC Radio 4's *Today* programme that the revised scheme is likely to apply to those 'people who, though they haven't committed murder, are pretty murderous ... It is probably just the skill of the medical profession stopping them from being in for murder'.¹⁸² This scepticism for defences founded upon mental abnormality is problematic, especially when the Secretary of State proposes a Bill which could have potentially significant consequences for mentally abnormal defendants. As far as the alcoholic defendant is concerned, it has been identified that those suffering from dependence syndromes do not receive an appropriate level of care in prison and are more likely to reoffend upon release. In this regard, alcohol-dependent defendants are potentially more vulnerable under the scheme than a defendant who does not suffer any form of mental abnormality. The proposals extend the mandatory life sentence rather than focusing on cathartic reform; 'a dangerous precedent for more reactionary justice secretaries to exploit in future'.¹⁸³

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The author expresses her thanks to Professor Alan Reed (University of Sunderland) and Ben Livings (Senior Lecturer, University of Sunderland) for their invaluable comments on earlier drafts of this article. The opinions expressed within this article are the author's own.

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1. See F. Dostoevsky, *Crime and Punishment*, 3rd edn (Bantam Dell: New York, 2003) 284.
2. To raise the concessionary defence successfully under the old law the defendant must have been able to prove, on the balance of probabilities, that he was suffering from 'such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired [D's] mental responsibility for his acts and omissions in doing or being a party to the killing' (Homicide Act 1957, s. 2).
3. R. Mackay, 'The Coroners and Justice Act 2009--Partial Defences to Murder (2) The New Diminished Responsibility Plea' [2010] Crim LR 290. See also R. Mackay and B. Mitchell, 'Loss of Control and Diminished Responsibility: Monitoring the New Partial Defences' (2011) 3 *Archbold Review* 5; C. Withey, 'Loss of Control' (2010) *Criminal Law and Justice Weekly*, 3 April 2010, available at: <http://www.criminallawandjustice.co.uk/index.php?/Analysis/loss-of-control.html>, accessed 29 November 2011; Rudi Fortson QC, 'Homicide Reforms under the CAJA 2009', Criminal Bar Association of England and Wales Seminar, October 2010, available at http://www.rudifortson4law.co.uk/legaltexts/HomicideOffences_CBA_handout_for_16thOct2010_R_Fortson_submitted_v.7.pdf, accessed 29 March 2011; L. Kennefick, 'Introducing a New Diminished Responsibility Defence for England and Wales' (2011) 74 MLR 750. See generally, *R v Inglis* (2011) 75 JCL 105, commentary by P. Dargue, 'Court of Appeal: Mercy Killers and the Sentencing Rules--An Uneasy Fit?'; H. Howard and M. Bowen, 'Unfitness to Plead and the Overlap with *Doli Incapax*: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 JCL 380.
4. Subsections (1), (1A) and (1B) of s. 2 of the Homicide Act 1957 were substituted and inserted by s. 52(1) of the Coroners and Justice Act 2009 (see the Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010 (SI 2010 No. 816), art. 5).
5. Ministry of Justice, *Murder, Manslaughter and Infanticide*, MoJ CP 19 (2008) para. 49.
6. Placing the burden of proof on the defendant is not incompatible with the European Convention on Human Rights, Art. 6(2); *R v Lambert, Ali and Jordan* [2002] QB 1112. See also *Lilburn (David) v HM Advocate* [2011] HCJAC 41 and C. Shead, 'Diminished Responsibility and the Burden of Proof' (2010) *Scottish Criminal Law* 819.
7. Homicide Act 1957, s. 2, as amended by the Coroners and Justice Act 2009, s. 52. It has been suggested that this element of the partial defence is 'representative of a marked shift towards medicalization of this area of the law'; Kennefick, above n. 3 at 765. See also, S. Morse, *Law and Psychiatry: Rethinking the Relationship* (Cambridge University Press: Cambridge, 1984).
8. Kennefick, above n. 3 at 757.
9. Law Commission, *Murder, Manslaughter and Infanticide*, Law Com. Report No. 304 (2006) para. 5.114. See also Kennefick, above n. 3 at 757.
10. World Health Organisation, *ICD-10: Mental and Behavioural Disorders Due to Psychoactive Substance Abuse*, ch. V, F10-F19 available at <http://apps.who.int/classifications/apps/icd/icd10online/>, accessed 29 November 2011. See also American Psychiatric Association, *DSM-IV, Diagnostic and Statistical Manual of Mental Disorders*, 4th edn (Washington DC, 1994).
11. Ormerod stated, '[a]rguably acute intoxication will also constitute a recognized medical condition': D. C. Ormerod, *Smith and Hogan's Criminal Law*, 13th edn (Oxford University Press: Oxford, 2011) 531, fn158.
12. *R v Majewski* [1977] AC 443. See also A. Simester, 'Intoxication Is Never a Defence' [2009] Crim LR 3; S. Gardner, 'The Importance of *Majewski*' (1984) 4 *Oxford Journal of Legal Studies* 279; J. Horder, 'Pleading Involuntary Lack of Capacity' (1993) 52 *Cambridge Law Journal* 298; Law Commission, *Intoxication and Criminal Liability*, Law Com. Report No. 314 (2009).
13. Kennefick, above n. 3 at 765. See also J. Hunter and J. Bergen, 'Diminished Responsibility: "Abnormal" Minds, Abnormal Murderers and What the Doctor Said' in S. M. H. Yeo (eds), *Partial Excuses to Murder* (Federation Press: Sydney, 1991); A. Kenny, *Freewill and Responsibility* (Routledge and Kegan Paul: London, 1978); S. T. Yannoulidis, 'Negotiating "Dangerousness": Charting a Course Between Psychiatry and the Law' (2002) 9 *Psychiatry, Psychology and Law* 151.
14. Scottish Law Commission, *Report on Insanity and Diminished Responsibility*, Scottish Law Com. No. 195 (2004) para. 3.40.

15. *Brennan v HM Advocate* 1977 JC 38 at 40 (considered below).
16. Section 23A(1) and (8) of the Crimes Act 1900 (NSW), as amended by the Crimes Amendment (Diminished Responsibility) Act 1997 (NSW) provides: '(1) A person who would otherwise be guilty of murder is not to be convicted of murder if: (a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right and wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and (b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter ... (8) In this section: "underlying condition" means a pre-existing mental or physiological condition other than a condition of a transitory kind' (emphasis added).
17. For example, acute intoxication, alcohol abuse, alcohol dependence syndrome, withdrawal state, etc.
18. This would involve a consideration of the number and longevity of the symptoms manifested by the defendant.
19. Q. Quick and C. Wells, 'Getting Tough with Defences' [2006] Crim LR 117.
20. Kennefick, above n. 3 at 763.
21. *R v Cannings* [2004] 1 All ER 725. See also B. McSherry, 'Expert Testimony and the Effects of Mental Impairment: Reviewing the Ultimate Issue Rule' (2001) 24 *International Journal of Law and Psychiatry* 13.
22. Diminished responsibility in this context refers to defendants who argued that they were suffering from some form of mental abnormality when they killed. The author does not wish to assert that New Zealand has ever recognised diminished responsibility as a palliative defence; rather, elements of the defence have arisen in previous case law within the jurisdiction (considered below).
23. W. Brookbanks, 'Partial Defences to Murder in New Zealand' in M. Bohlander and A. Reed (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: London, 2011) 287; New Zealand Press Association, 'Controversial "three strikes" bill passes', *New Zealand Herald*, 25 May 2010, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10647398, accessed 29 November 2011.
24. Coroners and Justice Act 2009, s. 53 makes identical provision for Northern Ireland. The provision came into force on 1 June 2011.
25. Homicide Act 1957, s. 2(1), as amended by the Coroners and Justice Act 2009, s. 52. See Law Commission, above n. 9 at para. 5.114; Mackay, above n. 3 at 290-302; R. Mackay, 'The Abnormality of Mind Factor in Diminished Responsibility' [1999] Crim LR 117 at 118.
26. Homicide Act 1957, s. 2(1), as substituted by the Coroners and Justice Act 2009, s. 52.
27. World Health Organisation, above n. 10.
28. 'Acute intoxication' is commonly referred to as 'drunkenness'. See World Health Organisation, *ICD-10: Management of Substance Abuse*, available at: http://www.who.int/substance_abuse/terminology/acute_intox/en/index.html, accessed 29 November 2011.
29. World Health Organisation, above nn 10 and 28.
30. Ibid.
31. A. Reed and N. Wake, 'Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed and Something New' in M. Bohlander and A. Reed (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: London, 2011) 191.
32. Homicide Act 1957, s. 2(1A)(a)-(c), as inserted by the Coroners and Justice Act 2009, s. 52.
33. [2010] EWCA Crim 194, [2010] 2 Cr App R 3.
34. See also *R v Ramchurn* (2011) 75 JCL 12, commentary by N. Wake, 'Substantial Confusion within Diminished Responsibility'; *R v Lloyd (Derek William)* [1967] 1 QB 175, [1966] 2 WLR 13, CA.
35. *R v Wood* [2008] Crim LR 976 at 978, commentary by A. J. Ashworth, 'Diminished Responsibility'.
36. Homicide Act 1957, s. 2(1B), as inserted by Coroners and Justice Act 2009, s. 52.
37. Ibid.
38. J. Chalmers, 'Partial Defences to Murder in Scotland: An Unlikely Tranquility' in M. Bohlander and A. Reed (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: London, 2011) 176. See also, Mackay, above n. 3 at 297-300.
39. *R v Wood* [2008] Crim LR 976 at 978.
40. The Criminal Justice and Licensing (Scotland) Act 2010 received Royal Assent on 6 August 2010. Section 168 of the

2010 Act inserts new s. 51B into the Criminal Procedure (Scotland) Act 1995. The codified defence provides as follows: 'A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind'.

41. 2002 JC 1.
42. Chalmers, above n. 38. See also, J. Chalmers, 'Abnormality and Anglicisation: First Thoughts on *Galbraith v HM Advocate* (No. 2)' (2002) *Edinburgh Law Review* 108; J. Casey, 'Diminished Responsibility and Battered Women Who Kill' (2001) *Scottish Law Times*, issue 38, 311. See also *HM Advocate v Kerr* [2011] HCJAC 17, which established that where a defendant successfully raises the partial defence in Scotland, he cannot be convicted of attempted murder.
43. *Galbraith (Kim) v HM Advocate* 2002 JC 1 at [54], point 5.
44. Chalmers, above n. 38.
45. 'Abnormality of mind' was described by Lord Parker CJ, in the leading case of *R v Byrne* [1960] 2 QB 396 at 403, CA, as 'a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise willpower to control physical acts in accordance with that rational judgment'. See also *Rose v Queen* [1961] 1 AC 496, PC; Mackay, above n. 25 at 117-25.
46. See, for further discussion, J. Chalmers and F. Leverick, *Criminal Defences and Pleas in Bar of Trial* (Green and Sons: Edinburgh, 2006) 228.
47. Ibid. See also Chalmers, above n. 38.
48. *Galbraith (Kim) v HM Advocate* 2002 JC 1. See also Chalmers, above n. 38.
49. *Brennan v HM Advocate* 1977 JC 38.
50. Above n. 49 at 40.
51. Scottish Law Commission, above n. 14 at para. 3.35.
52. See, e.g., *Alexander Dingwall* (1867) 5 Irv 466; *Andrew Granger* (1878) 4 Couper 86; *HM Advocate v Graham* (1906) 5 Adam 212.
53. Scottish Law Commission, above n. 14 at para. 3.37.
54. Ibid. at para. 3.38. These circumstances arose in the English case of *R v Dietschmann* [2003] UKHL 10.
55. Scottish Law Commission, above n. 14 at para. 3.38.
56. This position was considered by the English Court of Appeal in *R v Wood* [2008] EWCA Crim 1305, [2008] 2 Cr App R 34 (discussed below).
57. Scottish Law Commission, above n. 14 at para. 3.39.
58. Ibid. at para. 3.40.
59. Above n. 58.
60. Ibid.
61. The Scottish Law Commission recommended the following clause: 'A state of acute intoxication at the time of an unlawful killing should not by itself constitute diminished responsibility. However, a state of acute intoxication by itself should not prevent diminished responsibility from being established if the intoxication co-existed with, or was the consequence of, some underlying condition which meets the general criteria for the plea' (Scottish Law Commission, above n. 14 at para. 3.42).
62. Crimes Amendment (Diminished Responsibility) Act 1997 (NSW), s. 23A, see above n. 16 for the wording of the provision.
63. Northern Territory Criminal Code, s. 159 provides: '(1) A person (the defendant) who would, apart from this section, be guilty of murder must not be convicted of murder if: (a) the defendant's mental capacity was substantially impaired at the time of the conduct causing death; and (b) the impairment arose wholly or partly from an underlying condition; and (c) the defendant should not, given the extent of the impairment, be convicted of murder ... (3) If the defendant's impairment is attributable in part to an underlying condition and in part to self-induced intoxication, then, for deciding whether a defence of diminished responsibility has been established, the impairment must be ignored so far as it was attributable to self-induced intoxication' (emphasis added).
64. Law Commission, *Partial Defences to Murder*, Law Com. Report No. 290 (2004) paras 1.17 and 5.97.

65. Law Commission, above n. 9.
66. Rather than an 'abnormality of mental functioning'. See the Homicide Act 1957, s. 2, as amended by the Coroners and Justice Act 2009, s. 52. Another significant difference between the English and New South Wales approaches is that there is no causal requirement in the New South Wales defence despite the fact that the 'underlying condition' requirement was designed to provide New South Wales with a 'new and stricter defence of substantial impairment by abnormality of mind'; New South Wales Legislative Council *Hansard*, Crimes Amendment (Diminished Responsibility) Bill, 2nd Reading, 25 June 1997, 11064. In this regard, Ronnie Mackay has suggested that the new English '... diminished responsibility plea [may] be even stricter than its New South Wales counterpart' despite the lack of a specific clause pertaining to acute intoxication; R. Mackay, 'The New Diminished Responsibility Plea--More Than Mere Modernisation?' in M. Bohlander and A. Reed (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: London, 2011). See also S. Yeo, 'English Reform of Partial Defences to Murder: Lessons for New South Wales' (2010) 22 *Current Issues in Criminal Justice* 1 at 6; W. Wilson, 'The Structure of Criminal Homicide' [2006] *Crim LR* 471 at 483.
67. Law Commission, above n. 64 at para. 5.85.
68. See, e.g., *R v Dietschmann* [2003] UKHL 10; *R v Egan* (1992) 95 Cr App R 278, CA; *R v Inseal* [1992] *Crim LR* 35, CA; *R v Atkinson* [1985] *Crim LR* 314, CA; *R v Gittens* [1984] QB 698, (1984) 79 Cr App R 272, CA; *R v Fenton* (1975) 61 Cr App R 261, CA.
69. Simester, above n. 12. See also, Gardner, above n. 12; Horder, above n. 12; Law Commission, *Intoxication and Criminal Liability*, Law Com. Report No. 314 (2009).
70. See, e.g., *R v Stewart* [2009] EWCA Crim 593, [2009] 1 WLR 2507; *R v Wood* [2008] EWCA Crim 1305, [2008] Cr App R 34; *R v Tandy* [1989] 1 WLR 35, (1988) 87 Cr App R 45, CA.
71. *R v Dietschmann* [2003] UKHL 10 at [41].
72. A. P. Simester and G. R. Sullivan, *Criminal Law Theory and Doctrine* (Hart Publishing: Oxford, 2000) 580-1.
73. Unreported, 24 October 2002, High Court at Forfar. See also Scottish Law Commission, above n. 14 at para 3.38; J. Casey, 'Intoxication and Diminished Responsibility' (2003) *Juridical Review* 331.
74. *HM Advocate v Liam Thomas McLeod*, unreported, 24 October 2002, High Court at Forfar.
75. Chalmers and Leverick, above n. 46 at 231-2.
76. Law Commission, above n. 64 at para. 1.17.
77. Ministry of Justice, above n. 5 at para. 51.
78. Law Commission, above n. 9 at para. 5.123. See generally, J. Miles, 'A Dog's Breakfast of Homicide Reform' (2009) 10 *Archbold News* 5.
79. Casey, above n. 73 at 334.
80. *HM Advocate v Liam Thomas McLeod*, unreported, 24 October 2002, High Court at Forfar. See also J. Crichton, R. Darjee and D. Chiswick, 'Diminished Responsibility in Scotland: New Case Law' (2004) 15 *Journal of Forensic Psychiatry and Psychology* 552 at 559.
81. *Alexander Dingwall* (1867) 5 *Irv* 466; Casey, above n. 73 at 334.
82. *R v Tandy* [1989] 1 WLR 35, (1988) 87 Cr App R 45, CA; *R v Dietschmann* [2003] UKHL 10. See, generally, Casey, above n. 73 at 334.
83. *R v Wood* [2008] EWCA Crim 1305, [2008] 2 Cr App R 34 at [9]. See, generally, World Health Organisation, above n. 28.
84. See, e.g., *R v Egan* (1992) 95 Cr App R 278, CA; *R v Inseal* [1992] *Crim LR* 35, CA; *R v Atkinson* [1985] *Crim LR* 314, CA; *R v Gittens* [1984] QB 698, (1984) 79 Cr App R 272, CA; *R v Fenton* (1975) 61 Cr App R 261, CA.
85. The direction effectively mirrored the earlier direction provided in the heavily criticised case of *R v Tandy* [1989] 1 WLR 35, (1988) 87 Cr App R 45, CA. For further discussion see, Reed and Wake, above n. 31; A. Reed, 'Alcohol Dependence Syndrome and the Ambit of Diminished Responsibility' (2009) 173 *Criminal Law and Justice Weekly* 263; *R v Ramchurn* (2011) 75 JCL 12 at 17, commentary by Wake, above n. 34; J. Tolmie, 'Alcoholism and Criminal Liability' (2001) 64 MLR 688; J. Goodliffe, '*R v Tandy* and the Concept of Alcoholism as a Disease' (1990) 53 MLR 809 at 809-14.
86. *R v Tandy* [1989] 1 WLR 35, (1988) 87 Cr App R 45, CA.
87. Goodliffe, above n. 85.
88. Tolmie, above n. 85.

- [89.](#) *R v Wood* [2008] EWCA Crim 1305, [2008] 2 Cr App R 34 at [41], Sir Igor Judge P.
- [90.](#) *Ibid.*
- [91.](#) *R v Stewart* [2009] EWCA Crim 593, [2009] 1 WLR 2507.
- [92.](#) *Ibid.* at [29].
- [93.](#) *Ibid.* at 34, Sir Igor Judge P.
- [94.](#) Reed and Wake, above n. 31.
- [95.](#) The principle established in *Stewart* is reiterated in the annotations to the amended diminished responsibility plea: 'Note: A person's drinking should be considered in general for the purposes of this section, not by reference to separate incidents of drinking--*R v Stewart* [2009] EWCA Crim 593': annotations to the revised s. 2 of the Homicide Act 1957.
- [96.](#) R. Fortson 'The Modern Partial Defence of Diminished Responsibility' in M. Bohlander and A. Reed (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: London, 2011) 29.
- [97.](#) C. Martin, 'Diminished Responsibility in Queensland: Rationale, Advantages and Disadvantages' (2010) 3(2) *Queensland Law Student Review* 151.
- [98.](#) English Law Commission, above n. 64 at para. 5.12, fn 14.
- [99.](#) Scottish Law Commission, above n. 14 at para. 3.11; New Zealand Law Commission, *Battered Defendants: Victims of Domestic Violence who Offend*, Preliminary Paper 41 (2000) paras 118-119.
- [100.](#) New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility*, Report No. 82 (1997) para. 3.11.
- [101.](#) Crime (Sentencing Procedure) Act 1999 (NSW), s. 61(1).
- [102.](#) Brookbanks, above n. 23. See, generally, *R v McGregor* [1962] NZLR 1069 at 1081; *R v Gordon* (1993) 10 CRNZ 430, CA.
- [103.](#) Sentencing Act 2002, s. 102. See generally, New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, NZLC R73 (2001).
- [104.](#) Law Commission, above n. 99 at para. 126; Law Commission, *The Partial Defence of Provocation*, Law Com. Report No. 98 (2007).
- [105.](#) The controversial Act was passed by the House of Representatives on a 68:53 majority; New Zealand Press Association, above n. 23. The effect of the voluntary ingestion of alcohol or drugs does not operate as a mitigating factor affecting sentence (Sentencing Act 2002, s. 9(3)).
- [106.](#) Sentencing Act 2002, s. 102.
- [107.](#) See, Brookbanks, above n. 23. See also *R v McCarthy* [1992] 2 NZLR 550, (1992) 8 CRNZ 58, CA; *R v Ashton* [1989] 2 NZLR 166, (1989) 4 CRNZ 241, CA.
- [108.](#) New Zealand Law Reform Committee, *Report on Culpable Homicide* (1976) 3.
- [109.](#) New Zealand Law Commission, above n. 103; New Zealand Law Commission, above n. 104.
- [110.](#) High Court Christchurch, CRI 2008-012-137, 15 November 2009.
- [111.](#) The Crimes (Provocation Repeal) Amendment Bill 2009 (64-1) was enacted as the Crimes (Provocation Repeal) Amendment Act 2009 No. 64, s. 4 on 7 December 2009.
- [112.](#) *Clayton Robert Weatherston v The Queen* [2011] NZCA 276 at [2].
- [113.](#) *Ibid.* at [76].
- [114.](#) *Ibid.* at [25].
- [115.](#) *Ibid.*
- [116.](#) *Ibid.*
- [117.](#) *Ibid.* at [13].
- [118.](#) J. Booker, 'Jury finds Weatherston guilty of murder', *New Zealand Herald*, 22 July 2009 available at

http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10585763, accessed 30 November 2011.

- [119.](#) *Clayton Robert Weatherston v The Queen* [2011] NZCA 276 at [48]. The Court of Appeal noted that, 'some members of the public after the trial verbally attacked [defence counsel], making the fundamental error of transferring dislike for the accused to dislike for his counsel' (at [108]).
- [120.](#) Above n. 119.
- [121.](#) *Ibid.* at [77].
- [122.](#) *Ibid.*
- [123.](#) *Ibid.*
- [124.](#) Booker, above n. 118.
- [125.](#) E. Gay, 'Partial defence of provocation set to be dumped', *New Zealand Herald*, 23 July 2009, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10586155, accessed 30 November 2011. See also, New Zealand Press Association, 'Gay MP calls for change to law' *New Zealand Herald*, 11 July 2009, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10583823, accessed 30 November 2011.
- [126.](#) Quoted in D. Lomas, 'A law both hated and hailed' (2009) *New Zealand Listener*, Issue 3611, 25 July 2009, available at <http://www.listener.co.nz/commentary/a-lawboth-hated-hailed/>, accessed 30 November 2011.
- [127.](#) J. Tolmie, 'Defence of provocation has its place', *New Zealand Herald*, 7 September 2009 available at: http://www.nzherald.co.nz/justice-system/news/article.cfm?c_id=240&objectid=10595632, accessed 30 November 2011.
- [128.](#) Williams as cited in Lomas, above n. 126.
- [129.](#) Tolmie, above n. 127. See also the recent English case of *R v Inglis* [2010] EWCA Crim 2637, [2010] All ER (D) 140 (Nov) where a mother injected her son with a fatal dose of 'heroin so that his life could be ended to take him out of his misery and end his pain'. See generally, Dargue, above n. 3.
- [130.](#) Quoted in Lomas, above n. 126.
- [131.](#) Considered below.
- [132.](#) J. McGeorge, 'Weatherston v R [2011] Case Comment' (2011) NZSC 105.
- [133.](#) [1989] 2 NZLR 166, (1989) 4 CRNZ 241, CA.
- [134.](#) [1992] 2 NZLR 550, (1992) 8 CRNZ 58, CA.
- [135.](#) *Ibid.* at [66], Cooke P.
- [136.](#) Brookbanks, above n. 23. As a result of s. 9 of the Sentencing Act 2002 which specifically excludes the effects of voluntary intoxication from consideration during sentencing, the trial judge will still be required to distinguish between states of acute intoxication and alcohol dependence syndrome: C. Sisterson, 'One Bourbon, One Scotch, and One Beer' (2009) 125 *New Zealand Lawyer* 13, available at <http://www.nzlawyermagazine.co.nz/Archives/Issue125/125F8/tabid/2060/Default.aspx>, accessed on 30 November 2011.
- [137.](#) G. Orchard, 'Homicide' in N. Cameron and S. France (eds), *Essays on Criminal Law in New Zealand: Towards Reform?* (Victoria University of Wellington Law Review in conjunction with Victoria University Press: Wellington, 1990) 149.
- [138.](#) A. Simester and R. Sullivan, *Criminal Law Theory and Doctrine*, 4th edn (Hart Publishing: Oxford, 2010).
- [139.](#) Kenefick, above n. 3 at 750-66. See also J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217 at 244-6; Law Commission, above n. 9 at para. 2.147.
- [140.](#) Sentencing Act 2002, s. 86A, as inserted by the Sentencing and Parole Reform Act 2010, applies to 40 qualifying criminal offences. These offences are major violent and sexual offences with a maximum penalty of seven years' imprisonment or more. In sentencing or otherwise dealing with an offender, the court must take into account the following mitigating factors to the extent that they are applicable in the case: (a) the age of the offender; (b) whether and when the offender pleaded guilty; (c) the conduct of the victim; (d) that there was a limited involvement in the offence on the offender's part; (e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding; (f) any remorse shown by the offender; (g) any evidence of the offender's previous good character.
- [141.](#) A warning remains on the defendant's record unless the conviction is subsequently quashed; see New Zealand Ministry of Justice, *Sentencing and Parole Reform Act 2010*, available at <http://www.justice.govt.nz/courts/district-court/sentencingand-parole-reform-act-2010>, accessed 30 November 2011. Between 1 June 2010 and 30 September 2011, 790 first warnings were issued.

- [142.](#) In April 2011, Christchurch DC issued the first and only second-stage warning to date (*ibid.*).
- [143.](#) The rule applies in the following circumstances: 1. The defendant is given a no parole order for a third offence under the scheme (this does not affect the imposition of the maximum sentence for that offence); 2. The defendant is granted a no parole order for murder where it is a second or third offence under the scheme (the imposition of a sentence of life imprisonment is not affected by this rule); 3. A non-parole period of 20 years for murder where it is the defendant's third offence if the court fails to make a no parole order; 4. A non-parole period of 20 years for manslaughter where it is the defendant's third offence (this does not apply to the imposition of the maximum sentence of life imprisonment); 5. Minimum non-parole periods equivalent to the maximum sentence of imprisonment when the court imposes preventive detention for stage 3 offences: New Zealand Ministry of Justice 'What does manifestly unjust mean', available at <http://www.justice.govt.nz/courts/district-court/sentencing-and-parole-reformact-2010/what-does-2018manifestly-unjust2019-mean>, accessed 30 November 2011.
- [144.](#) Brookbanks, above n. 23. An offender who is convicted of manslaughter, for example, having previously been issued a final warning, will be liable to 20 years' imprisonment. If, however, the court regards such a sentence as 'manifestly unjust', a life sentence must still be imposed but the court may grant an order that the defendant serves no fewer than 10 years in prison: Sentencing Act 2002, s. 86D(4). The fact that the defendant suffered from an abnormality of mind and/or was provoked at the time of the killing will not be relevant for a third-stage offence.
- [145.](#) The court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes) (Sentencing Act 2002, s. 9(2)-(3)).
- [146.](#) New Zealand Press Association, above n. 23.
- [147.](#) Sisterson, above n. 136. See also the Criminal Justice and Licensing (Scotland) Act 2010, s. 26(2): 'A court, in sentencing the offender in respect of the offence, must not take ... [voluntary intoxication] into account by way of mitigation'.
- [148.](#) *Ibid.*
- [149.](#) Quoted in Sisterson, above n. 136; Rumbles is a Senior Lecturer at Waikato University Law School.
- [150.](#) Sentencing Act 2002, s. 102.
- [151.](#) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case: (a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon; (b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place; (c) that the offence was committed while the offender was on bail or still subject to a sentence; (d) the extent of any loss, damage, or harm resulting from the offence; (e) particular cruelty in the commission of the offence; (f) that the offender was abusing a position of trust or authority in relation to the victim; (g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender; (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and (i) the hostility is because of the common characteristic; and (ii) the offender believed that the victim has that characteristic; (ha) that the offence was committed as part of, or involves, a terrorist act (as defined in s. 5(1) of the Terrorism Suppression Act 2002); (i) premeditation on the part of the offender and, if so, the level of premeditation involved; (j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time (Sentencing Act 2002, s. 9(1)).
- [152.](#) Brookbanks, above n. 23. See also Sentencing Act 2002, s. 104(1).
- [153.](#) New Zealand Ministry of Justice, 'Sentencing Act 2002: Questions and Answers', available at <http://www.justice.govt.nz/publications/publications-archived/2002/sentencingact-2002/questions-answers#Why'don%E2%99täill'murdersi>, accessed 30 November 2011.
- [154.](#) *Ibid.*
- [155.](#) The Sentencing and Parole Reform Act 2010 amended the Sentencing Act 2002 by adding new ss 86A-86I.
- [156.](#) Brookbanks, above n. 23.
- [157.](#) *Ibid.*
- [158.](#) *Ibid.*
- [159.](#) R. Mansfield, quoted in Lomas, above n. 126.
- [160.](#) *Ibid.*
- [161.](#) P. Williams QC, quoted in Lomas, above n. 126.
- [162.](#) R. Mansfield, quoted in Lomas, above n. 126.

- [163.](#) Brookbanks, above n. 23.
- [164.](#) As defined in the Crime (Sentences) Act 1997, s. 34.
- [165.](#) Clause 114 of the Bill provides for a new s. 224A to be inserted into Chap. 5, Part 12 of the Criminal Justice Act 2003 (Sentencing: dangerous offenders).
- [166.](#) Ibid.
- [167.](#) Section 224A(5)-(10) detail the relevant sentencing periods.
- [168.](#) A. Travis, 'Magistrates condemn government plan to extend mandatory sentences', *Guardian*, 27 October 2011, available at <http://www.guardian.co.uk/politics/2011/oct/27/kenneth-clark-two-strikes-life-sentencing>, accessed 30 November 2011.
- [169.](#) Justice, 'Clarke announces new sentences to "restore clarity and common sense"', 27 October 2011, available at <http://www.justice.gov.uk/news/features/feature271011a.htm>, accessed 30 November 2011
- [170.](#) A. Ashworth, 'Principles, Pragmatism and the Law Commission's Recommendation on Homicide Law Reform' [2009] Crim LR 333 at 334.
- [171.](#) Kennefick, above n. 3 at 751.
- [172.](#) Travis, above n. 168.
- [173.](#) M.L. Clews, 'Prison alcohol rehabilitation urgently needed to cut crime', *The Rehabilitation for Addicted Prisoners Trust*, 30 August 2011, available at: <http://www.rapt.org.uk/news.asp?itemid=301&itemTitle=Prison+alcohol+rehabilitation+urgently+needed+to+cut+crime§ion=36§ionT> accessed 30 November 2011.
- [174.](#) Ibid.
- [175.](#) E. Allison, 'High-security prison unit criticised for holding mentally ill inmates', *Guardian*, 25 October 2011, available at <http://www.guardian.co.uk/society/2011/oct/25/high-security-prison-mental-illness>, accessed 30 November 2011.
- [176.](#) P. Hayes, 'We do offer drug addicts treatment in prison', *Guardian*, 3 February 2010, available at <http://www.guardian.co.uk/commentisfree/2010/feb/03/drug-usersheard-by-system>, accessed 30 November 2011; A. J. Roberts, A. J. Hayes, J. Carlisle and J. Shaw, 'Review of Drug and Alcohol Treatments in Prison and Community Settings: A Systematic Review Conducted on Behalf of the Prison Health Research Network' (2007) Project commissioned by Offender Health in the Department of Health, via the Prison Health Research Network.
- [177.](#) Clews, above n. 173.
- [178.](#) Travis, above n. 168.
- [179.](#) Goodliffe, above n. 85.
- [180.](#) M. Roth, *Alcohol and Alcoholism: The Report of a Special Committee of the Royal College of Psychiatrists* (Tavistock Publications: 1979) vi.
- [181.](#) Editorial, 'Ken Clarke: the revolution that never was', *Guardian*, 28 October 2011, available at <http://www.guardian.co.uk/commentisfree/2011/oct/28/ken-clark-the-revolution-that-never-was>, accessed 30 November 2011.
- [182.](#) H. Mulholland, 'Politics Live Blog--Thursday 27th October 2011', available at <http://www.guardian.co.uk/politics/2011/oct/27/politics-live-blog>, accessed on 30 November 2011.
- [183.](#) Editorial, above n. 181.

Conclusion

These publications identify and critically address the issues faced by offenders who raise the spectre of co-morbidity, in the context of medical conditions complicated by the use of alcohol. It was suggested a failure to adequately legislate for this discrete category of vulnerable offender could result in appellate court litigation, and this prediction was borne out in relation to both partial defences. The first appellate court case to address the 'recognised medical condition' requirement concerned *Dowds*⁹⁹, an offender who sought to claim diminished responsibility on grounds he was extremely intoxicated when he killed his partner.¹⁰⁰ In *Asmelash*¹⁰¹, the Court of Appeal was required to assess whether voluntary intoxication could fall within the 'defendant's circumstances' for the purposes of the loss of control defence.

It is 'unremarkable' the court adopted Majewski standardisations and rejected *Dowds*' plea.¹⁰² The Lord Chief Justice also ruled jurors should ignore *Asmelash*'s intoxication for the purposes of the 'normal person' test.¹⁰³ Accordingly, the question is whether a person of the defendant's 'sex and age with a normal degree of tolerance and self-restraint and in the same circumstances, but unaffected by alcohol, would not have reacted in the same or similar way?'¹⁰⁴ In both cases, their Lordships took care to assert that their rulings apply to acute intoxication only;¹⁰⁵ alcohol dependence syndrome will continue to be relevant to diminished responsibility claims,¹⁰⁶ and may be a relevant circumstance in loss of control cases where the offender is ruthlessly taunted about that condition (Alcohol abuse and dependence were also merged under the head of substance use disorder under the DSM-V).¹⁰⁷ This was predicted in both publications. This

⁹⁹ Considered in (iv). See, Nicola Wake, 'Acute intoxication and diminished responsibility: Raising the bar?' *Journal of Criminal Law* (2012) 76(3) 197-202 (note); Nicola Wake, 'Intoxication in the Dock; Specimen Directions for Jurors' *Journal of Criminal Law* (2010) 74(1), 16-20 (note); and Nicola Wake, 'Diminished responsibility and murder: reconciling the mandatory life sentence with the evolution of criminal law?' *Journal of Criminal Law* (2009) 73(4) 300-304 (note); all three are available at Appendix C.

¹⁰⁰ *Dowds* (n 70) [35].

¹⁰¹ *Asmelash* (n 70). Considered in detail in (iv).

¹⁰² Rudi Fortson, 'Developments in Law 2012 (Serious Crime)' (2012) available at: <<http://www.rudifortson4law.co.uk/legaldevelopments12.php>> accessed 14 October 2015.

¹⁰³ Coroners and Justice Act 2009, Section 54(1)(c). Law Com No 306, 2006 (n 50) 134.

¹⁰⁴ *Asmelash* (n 70) [15].

¹⁰⁵ *Dowds* (n 70) [34].

¹⁰⁶ *ibid.*

¹⁰⁷ That is, to the extent that it amounts to a qualifying trigger; *Asmelash* (n 70) [25]. See American Psychiatric Publishing, *Substance Related and Addictive Disorders* (APP, 2013) available: <<http://www.dsm5.org/documents/substance%20use%20disorder%20fact%20sheet.pdf>> accessed 10 February 2016.

litigation could have been prevented by the exclusion clauses advanced. The Law Commission's insanity and automatism discussion paper acknowledged Parliament's failure to address the inter-relationship between intoxication and defences.¹⁰⁸ The Commission excluded voluntary acute intoxication from its newly proposed 'not criminally responsible by reason of a recognised medical condition' defence ('RMC defence').¹⁰⁹ Accordingly, the reform proposals recommended herein remain relevant and viable options for future reform.

Although the issues raised in *Dowds*¹¹⁰ were predicted within publications (i) and (ii), the case law departed from the approach advocated by this author in respect of the meaning of the phrase 'substantial impairment'.¹¹¹ Resigning from the 'more than trivial but less than total' approach identified, the Court of Appeal, in *Golds*¹¹², considered the term 'substantial impairment' was capable of two possible meanings. The first being, the abnormality of mental functioning could be said to substantially impair the defendant's ability to understand the nature of his conduct, form a rational judgment and/or exercise self-control, if it does so to a 'more than merely trivial' extent.¹¹³ A second possibility is, an abnormality of mental functioning substantially impairs a defendant's ability to do one of the three things, identified above, if 'it significantly or appreciably impairs that ability, beyond something that is merely more than trivial'. Their Lordships advocated the trial judge should, in future cases, refuse to elaborate on the meaning of the word 'substantial' on the 'optimistic' premise that this ought to be obvious. If assistance is required, jurors should be directed in relation to the second meaning.¹¹⁴ It is problematic that substantial is given a different meaning in the context of causation (more than minimal) to diminished responsibility, when principles of both areas may be considered in

¹⁰⁸ Explored in (iii). Law Com DP, 2013 (n 7) para 3.15.

¹⁰⁹ Considered in detail in (iii).

¹¹⁰ (n 70).

¹¹¹ In (ii), the author noted: '[T]he term "substantial impairment" is one of very few remnants of the original diminished responsibility plea. In this regard, it would seem that the court will continue to follow the ruling adumbrated in *R v Ramchurn* [reference omitted] in which the court reflected "substantially impaired" within s.2(1) of the Homicide Act 1957 meant something more than trivial but less than total [reference omitted]'. The author stated, in publication (i), this approach is 'in line with the earlier ruling in *Lloyd* [reference omitted] which amounted to authority the word "substantial" constituted a word "for which one should not try to find a synonym. It is a word, which members of the jury, with their own common sense, can tell what it means [reference omitted]'. For discussion see Nicola Wake, 'Psychiatry and the new diminished responsibility plea; Uneasy bedfellows? *Journal of Criminal Law* (2012) 76(2), 122-129 (note); and, Nicola Wake, 'Substantial Confusion with diminished responsibility? (2011) *Journal of Criminal Law* 75(1) 12-16 (note); both included at Appendix D.

¹¹² *Golds* (n 70).

¹¹³ *ibid* [64].

¹¹⁴ *ibid* [72].

the same trial.¹¹⁵ These issues are complicated by the fact that the abnormality of mental functioning must provide an explanation for the defendant's acts or omissions in the commission of the fatal offence.¹¹⁶ This will be the case if it causes, or is a significant contributory factor in causing the defendant's conduct. The term 'significant' as opposed to 'substantial' means 'more than merely minimal'.¹¹⁷ This meaning of the term 'substantial impairment' is set to be considered by the Supreme Court in July 2016.¹¹⁸

In the same context, the Court of Appeal in *Brennan*¹¹⁹ clarified the ambit of the medical expert's role in diminished responsibility cases.¹²⁰ Medical evidence is a 'practical necessity';¹²¹ where there is no proper basis for departing from unchallenged medical evidence, then juries may not do so.¹²² As Fortson identifies this case gives helpful guidance to experts and practitioners concerning the issues in respect of which the expert is permitted to express an opinion (including the ultimate issue).¹²³ The shift from a moral evaluative judgment regarding the offender's responsibility (a jury question) to a qualitative assessment of the offender's abilities renders the medical expert best placed to advise on the offender's impairment.¹²⁴ This is significant for vulnerable offenders who exhibit signs of co-morbidity since the medical expert will be in a position to explain the impact of the diagnosis on the abilities identified. This in-depth analysis of the law relating to offenders with co-morbidity is explored further in Part Two, where detailed consideration is given to the efficacy of the doctrine of prior fault in the context of medical condition defences.

¹¹⁵ Tony Storey and Natalie Wortley, 'More than merely more than minimal: the meaning of the term "substantial" in the context of diminished responsibility' (n 6). The trial judge will not only have to explain the two different approaches to the term, but perplexed jurors will have to engage in mental gymnastics in assessing whether the defendant's actions were 'more than a minimal or trivial' cause of the victim's death, before assessing whether the defendant's abnormality of mental functioning impaired the defendant's abilities to a 'more than merely minimal or trivial extent'.

¹¹⁶ Section 2(1)(c) Homicide Act 1957, as amended by the Coroners and Justice Act 2009, section 52.

¹¹⁷ 'We do not require the defence to prove that it was the only cause or the main cause or the most important factor, but there must be something that is more than a merely trivial factor. There needs to be a link...'; House of Commons, *Hansard Parliamentary Debates*, 4 March 2009 (HC Deb 4 March 2009).

¹¹⁸ For critique of the approach adopted in *Golds* [2014] EWCA Crim 748 see, Mitchell and Mackay (n 71). Advised by Lord Hughes that the issue relating to 'substantial impairment' is to be considered by the Supreme Court in July 2016 (Society of Legal Scholars, President's Annual Reception).

¹¹⁹ See, *Brennan* [2014] EWCA Crim 2387. See, Fortson (n 71).

¹²⁰ *ibid*, Fortson.

¹²¹ See, *Bunch* [2013] EWCA Crim 2498. See, Tony Storey, 'Diminished Responsibility: No defence without evidence' *The Journal of Criminal Law*, 78, 114-117 (note).

¹²² *Brennan* (n 119).

¹²³ Fortson (n 71) 293.

¹²⁴ *ibid*.

Part Two: *Prior Fault and Mental Condition Defences*

- (iii) 'Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication'¹²⁵
- (iv) 'Potentiate Liability and Preventing Fault Attribution; The Intoxicated "Offender" and Anglo-American *Dépeçage* Standardisations'¹²⁶

Introduction

By broadening the analysis to explore the relationships between intoxication, and insanity and automatism, the following publications build upon the research underpinning Part One. This analysis is timely given the Law Commission's insanity and automatism project was placed on hold following the release of its discussion paper in 2013.¹²⁷ It is worth noting, there is no political will in E&W to amend the law on intoxicated offending and/or mental condition defences.¹²⁸ The Law Commission is unlikely to return to their project in the near future given the limited number of responses it received during scoping paper consultation.¹²⁹ It is important to be aware of the political landscape in terms of placing the literature and recommendations within their context; this should not detract from advancing optimal solutions to current problems within the law. The recommendations for future development contained herein would be relevant to any future continuation of the Commission's work and/or review of the area. Unlike the partial defences, automatism and insanity are general defences that may apply to any offence charged. As such, the analysis of the inter-relationship between intoxication and these defences extends beyond the specific intent offence considered, thereby incorporating

¹²⁵ (n 77) 113-132.

¹²⁶ (n 78) 57-113.

¹²⁷ Law Com DP, 2013 (n 7).

¹²⁸ It should be noted, the Law Commission is currently working on a project focused upon Unfitness to Plead; an area closely related to the defences being considered; fitness to plead does not form part of the present assessment since this collection focuses upon the criminal law defences that might be claimed where a case proceeds to trial, rather than the pre-trial phase procedures. For information on the Law Commission's work in this area see, Law Com, 2010-2016 (n 50). For an excellent analysis of the present law and the Law Commission's work see, Rudi Fortson, 'Reforming Unfitness to Plead for Adults in the Crown Court: A Practitioner's Perspective' in *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholars Publishing, 2015) 1-51.

¹²⁹ For information on the project see, Law Commission, *Insanity and Automatism* (Law Com, 2012-2013) available: <<http://www.lawcom.gov.uk/project/insanity-and-automatism/>> accessed 26 October 2015. Comments regarding the likelihood of returning to the project from David Ormerod at Northumbria University, *Mental Condition Defences and the Criminal Justice System* (2013) conference.

basic intent offences to which different intoxication principles apply.¹³⁰ In the context of basic intent offences, the defendant's recklessness in becoming intoxicated is substituted for the *mens rea* of the offence charged, thereby having significant ramifications in terms of legal culpability.¹³¹ Accordingly, whether the offender's voluntary intoxication, medical condition or an alternative external factor caused the defendant's behaviour is relevant in determining whether the defendant is guilty, not guilty by reason of a recognised medical condition (and subject to a disposal order), or not guilty (and entitled to an outright acquittal), respectively. Although the Law Commission recommendations are designed to make any new insanity defence more accessible to vulnerable offenders, the publications reveal that emphasis remains firmly upon ensuring the defence is not abused. A recalibration must occur to ensure that clear focus is placed upon vulnerable offenders when reforming mental condition defences.

Publication, (iii) assesses the pressure placed on the legal approach to intoxicated offending, from an Anglo-Australian perspective.¹³² The pressure identified arises from two main sources. The first is the increase in the number of vulnerable offenders intoxicated by non-dangerous drugs, individuals who appear to not be at fault, although they became intoxicated consciously or willingly. The high profile of intoxication from so-called non-dangerous drugs has challenged the notion that all (voluntarily) intoxicated offenders are culpable for their condition in some way, which in turn has made it difficult to utilise prior fault to bolster the ostensible coherence and certainty of this area of the criminal law. The second source of pressure on the current approach arises from cases involving those offenders, introduced in Part One, who raise the spectre of comorbidity; the latter category of offender is often viewed with less sympathy than the offender intoxicated by non-dangerous drugs; and it is questionable whether the current position remains apposite in terms of attributing criminal responsibility.

These difficulties infect the new proposals posited by the Law Commission, which would introduce a heavily circumscribed automatism defence, and a broad RMC defence, under which the notion of prior fault would have increased prevalence. The issue of non-dangerous drugs currently falls for consideration under the automatism de-

¹³⁰ See, *Majewski* (n 70). See, generally, Simester (n 89).

¹³¹ *ibid*, *Majewski*.

¹³² It is recognised that repudiation of prior fault principles does not open the floodgates for intoxicated offenders to claim they are not criminally responsible; *O'Connor* (n 70).

fence.¹³³ Under the new proposals, this issue would shift to the new RMC defence.¹³⁴ In cases where the ingestion of non-dangerous drugs represents the predominant cause of the defendant's conduct, the defence will only be available where the ingestion of those substances was in accordance with the prescription and/or instructions provided (unless non-compliance was reasonable in the circumstances). The effect of this change is two-fold. First, the outright acquittal following an automatism verdict would not necessarily follow a verdict of 'not criminally responsible by reason of recognised medical condition'.¹³⁵

The second effect of the change would be to extend the notion of prior fault to a defendant's unreasonable failure to comply with a prescribed medication regimen. In cases where the defendant was aware of the likely consequences of non-compliance, he or she will be convicted of any basic intent offence charged (assuming the remaining elements of the offence are satisfied) and sentenced accordingly. Currently, a blanket exclusion operating on the defendant's omission ensures the insanity defence remains available. The rationale for this position is that the defendant's condition, and not the omission to act, is regarded as having caused the defendant's conduct. The change emphasises the defendant's (ir)responsibility in failing to follow his/her prescription. The imposition of criminal liability is unlikely to encourage individuals to take medication; whether a sharp moral divide exists between an offender who overdoses and a defendant who fails to follow a prescribed medication regimen is unclear; the efficacy of imposing criminal liability is questionable. This proposal must be revisited to ensure vulnerable offenders are adequately accommodated under revised and/or new provisions.

Publication (iv) focuses upon the problematic notion of prior fault, suggesting reform to the law on intoxicated offending is required; repudiation of the Majewski rules, considered in (iii) would be preferable. Given there is little political will for such 'radical' reform, a *via media* is proposed in (iv), which recognises the divergent categories of offender, and would address the issue of intoxicated offending through the introduction of

¹³³ See, generally, Law Com DP, 2013 (n 7).

¹³⁴ *ibid.*

¹³⁵ Given the negative connotations that often attach to mental condition defences, commentators have voiced concern over attaching the RMC defence label to those who do in fact comply with a prescribed regimen and/or those who have a valid reason for non-compliance. For an analysis of the problems associated with fair labelling in this area see, Elizabeth Shaw, 'Automatism and Mental Disorder in Scots Criminal Law' [2015] *Edinburgh Law Review* 19(2), 210-233.

an offence predicated upon criminal behaviour induced by voluntary intoxication. The problems with the current categorisations utilised in criminal law are considered in light of the US approach to intoxicated offending, identifying significant commonalities across the Anglo-American schematic template to intoxicated offending. *Dépeçage* principles are used to 'pick and choose' different laws to govern specific issues of intoxication arising in four key contexts: Dutch courage and drinking to commit specific offences; pathological intoxication and imbibing of 'therapeutic' substances; involuntary intoxication (outwith alcoholism); and basic intent offences *simpliciter*. This formulation is predicated on the notion of potentiate liability, which provides a moral credibility and fairer approach to offence individuation than the current law. A modified partial diminished responsibility defence is advanced; this new provision would enhance the current law in E&W, and provide a needed partial defence to alcoholic offenders in the US, where the condition is presently viewed as 'part vice and part disease.'¹³⁶ Reform of the problematic notion of prior fault is required to recalibrate the current approach, which focuses on preventing the availability of mental condition defences, and not enough on the vulnerable offenders to which these defences ought to be available.

¹³⁶ Mariana Valverde, *Diseases of the will: Alcoholism and the dilemmas of freedom* (Cambridge University Press, 1998). See, Stephen Morse, *A Good Enough Reason: Addiction, Agency and Criminal Responsibility* (Taylor & Francis, 2013) 490-518.

Publication (iii)

‘Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication’ in *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate Publishing, 2014) 113-132.

Chapter 8

Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication

Arlie Loughnan and Nicola Wake¹

Introduction

It is well known that, while a significant number of defendants facing criminal trials were inebriated at the time of committing the alleged offence, only a relatively small percentage of these defendants raise intoxication as part of their defence case.² That is in significant part a result of the criminal law on intoxicated offending, which, as is also well known, restricts the contexts in which intoxication can be used to cast doubt upon whether the Crown has proved the elements of the offence beyond a reasonable doubt. It is also in part a result of strategic decisions made by defendants and defence lawyers, decisions that are made in light of the multiple (and contradictory) moral–social meanings of intoxication. If these defendants raise a defence, it may be one of the general defences, such as insanity or automatism, considered below, or an alternative defence discussed in detail elsewhere in this edited collection. And when this occurs, factual intoxication, the law on intoxicated offending, and general criminal law defences are brought into interaction with each other.

Over recent decades, the legal treatment of this interaction has developed on the basis of a particular set of attitudes towards the ‘problem’ of intoxicated offending. These attitudes—epitomised by the House of Lords’ decision of *Majewski*³—have given rise to a condemnatory approach to intoxicated offending.⁴ This condemnatory approach has coalesced around a moral-evaluative notion of prior fault, which now sits at the heart of the law on intoxicated offending, and which, as we discuss in this chapter, is central to the recent Law Commission for England and Wales (the Commission) proposals concerning intoxication, insanity and automatism. At its core, the notion of prior fault conveys the idea that an individual should not be able to rely on a defence when he or she has culpably brought about the condition that forms the basis of that defence.⁵ The significance of prior fault in the criminal law has affected the construction of the law on intoxicated offending—restricting the contexts in which intoxication may be raised by the defendant to suggest that he or she did not form the requisite *mens rea* for the offence⁶—and the relationship between intoxication and general defences—the ways in which factual intoxication relates to claims to exculpation advanced under other criminal law doctrines.

This situation, which was arguably always fragile, is now coming under increased pressure. The pressure arises from two main sources. The first of these is the rising profile of defendants intoxicated by what have been called non-dangerous drugs, individuals who appear not to be at fault, although they became intoxicated

¹ The authors would like to thank Andrew Ashworth and Jesse Elvin for their comments on an earlier version of this chapter, and Alexandra Chappell for her assistance in the preparation of this chapter for publication.

² See, for example, RJ Stevenson, L Bind and D Weatherburn, ‘The Relationship Between Alcohol Sales and Assault in New South Wales, Australia’ (1999) 94 *Addiction* 397–410; RDF Bromley and AL Nelson, ‘Alcohol-Related Crime and Disorder Across Urban Space and Time: Evidence From a British City’ (2002) *Geoforum* 239–254.

³ *DPP v Majewski* [1977] AC 443.

⁴ See Andrew Simester, ‘Intoxication Is Never A Defence’ [2009] *Crim LR* 3. See also herein, JJ Child, 37–50.

⁵ Law Commission for England and Wales, *Criminal Liability: Insanity and Automatism, A Discussion Paper*. Law Com DP, 2013 [6.1].

⁶ In this chapter, we refer to the doctrine of intoxication and the law on intoxicated offending, using these references interchangeably. See further Arlie Loughnan, ‘Putting Mental Incapacity Together Again’ (2012) 15 *New Crim L Rev* 1.

willingly or consciously.⁷ These defendants may be intoxicated by prescription, soporific or sedative drugs, for instance, and are not assumed to have been aware of the consequences of consumption of the drug, at least in the same way as knowledge of the effects of alcohol is presumed to be generalised within the community.⁸ These cases have generated a thin line of case law in which defendants, although not involuntarily intoxicated, are not as readily blameworthy as the quintessential intoxicated defendant, one who is intoxicated by voluntary consumption of alcohol or dangerous drugs. The second source of pressure on the current situation is the increasing attention given to the cases of mentally ill defendants who were also intoxicated at the time of the offence.⁹ These defendants raise the spectre of co-morbidity, a medical term that denotes the co-existence of two or more psychiatric conditions, or the co-existence of mental illness and substance abuse.¹⁰ In this chapter, we use the term in the latter sense. Co-morbid defendants are not generally viewed with the same degree of compassion as defendants intoxicated by non-dangerous drugs, and, indeed, have been the subject of significant concern regarding the relative importance of the intoxication and of the mental condition in the offending behaviour, and the appropriateness of using the insanity defence to accommodate such defendants.¹¹

This complex and dynamic situation forms the starting point for our discussion of the relationship between intoxication and the insanity and automatism defences in this chapter. The central issue animating the legal relationship between intoxication and insanity/automatism is deceptively simple. As recently articulated by the Commission, the issue is accurately distinguishing 'between those who should be held criminally responsible for what they have done, and those who should not because of their condition'.¹² But this is easier to state than to achieve—it is difficult to neatly demarcate between defendants in this way. On the one hand, the spectre of co-morbidity means that certain defendants raising insanity may be thought to be culpable for their condition, challenging the assumption that insanity correlates with an absence of prior fault. On the other hand, while the *Majewski* approach to intoxication is predicated on the idea that (voluntarily) intoxicated defendants are culpable in some way, this is overly simplistic and those intoxicated by non-dangerous drugs subvert this idea. Here, we focus on the situation of the defendants who resist the neat categorisations of the criminal law, via a critical assessment of the inter-relation between intoxication and the general defences of insanity and automatism.¹³ We suggest that the increasingly apparent difficulties associated with co-morbid defendants raising insanity, and the challenges of accommodating an increasingly differentiated group of defendants beneath the scope of the *Majewski* approach to intoxication, are putting pressure on the neat distinctions currently structuring this area of criminal law, and on the notion of prior fault that constitutes its centrepiece.

7 See *Quick* [1973] 3 All ER 347; *Bailey* [1983] EWCA Crim 2; and *Hardie* [1985] 1 WLR 64. In recent years, in the UK, controversy over the mismatch between drug policy and the relative harms of illicit and licit drugs has led to the creation of the Independent Scientific Committee on Drugs: <<http://www.drugscience.org.uk/>> accessed 16 January 2014. On the relative harms of illicit and licit drugs, see David J Nutt, Leslie A King and Lawrence D Phillips, 'Drug Harms in the UK: A Multicriteria Decision Analysis (2010) 376 The Lancet 1558–1565; and David J Nutt, Leslie A King, W Saulsbury, and C Blakemore, 'Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse' (2007) 369 The Lancet 1047–1053.

8 In relation to knowledge of intoxicants, see Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (OUP 2012) ch 7.

9 See, for example, Coley [2013] EWCA Crim 223; New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences* (NSWLRC No 138, 2013); Attorney-General's Department, South Australia (2013) *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)*, July 2013 <<http://www.agd.sa.gov.au/about-agd/what-we-do/services-government/sentencing-advisory-council-south-australia>> accessed on 28 December 2013.

10 See generally on co-morbidity, Maree Teeson and Lucy Burns (eds), *National Drug Strategy and National Mental Health Strategy*, National Co-Morbidity Project, National Drug and Alcohol Research Centre (2001) <<http://www.health.gov.au/internet/main/publishing.nsf/Content/health-pubhlth-publicat-document-metadata-comorbidity.htm>> accessed 28 December 2013.

11 See, for example, *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)*, July 2013 (n 8).

12 Law Com DP, 2013 (n 4) [1.18] [6.3].

13 Challenges relating to intoxication also arise in the context of other defences such as self-defence and duress. See Ronnie Mackay, *Mental Condition Defences and the Criminal Law* (OUP 1995) 165–168..

Examination of the interaction of intoxication and insanity and automatism is timely, as it has recently received high profile legal attention.¹⁴ In its latest assessment of insanity and automatism, the Commission dedicated an entire chapter of its Discussion Paper to 'The relationship to the law on prior fault and intoxication'.¹⁵ The Commission acknowledges that the 'complex and heavily policy laden' *Majewski* approach has created difficulties, but explains that it was not possible to revisit the law on intoxication generally within its terms of reference.¹⁶ As a result, the Commission's proposed 'recognised medical condition' defence (hereinafter 'RMC defence'), and substantially altered automatism defence, are designed to ameliorate the difficulties in the law whilst operating alongside the intoxication rules and existing principles on prior fault.¹⁷ As we suggest below, it might be that it is not possible to 'fix' this area of the criminal law in the absence of reform to the law on intoxicated offending.

In our discussion of the approach taken to intoxication and insanity/automatism in England and Wales, we draw on the law, and law reform debates, in several Australian jurisdictions.¹⁸ There are interesting differences between these two national contexts. For instance, while NSW has followed England and Wales in adopting the law on intoxication set out by the House of Lords in the decision of *Majewski* (albeit with some modifications in form rather than substance), Victoria has rejected the *Majewski* approach, and, in accordance with the Australian High Court decision of *O'Connor*,¹⁹ permits evidence of intoxication to be adduced in relation to all criminal offences. Despite these differences in approach to intoxicated offending, each jurisdiction faces similar challenges in responding to defendants who fall on the fault lines between insanity, automatism and intoxication.

This chapter consists of three main parts. In Part 2, we demonstrate the centrality of prior fault in the current law via an overview of the law on intoxicated offending, and the insanity and automatism defences. In Part 3, we examine the impact of co-morbidity on the relationship between the *Majewski* approach and the insanity/automatism defences, and in Part 4, we explore the fragility of prior fault through a discussion of the treatment of defendants who become incapacitated by taking non-dangerous drugs or failing to comply with a prescribed medication regimen. In each of these parts, we also consider the Law Commission's proposals for changes to this area of the law and suggest that the recommendations may not provide the coherence and certainty trumpeted by the Commission.

The State of Play: The Role and Significance of Prior Fault

In this part of the chapter, we lay the ground for our subsequent discussion with a brief overview of the law on intoxication, insanity and automatism. This discussion shows the central role the defendant's perceived prior fault plays in the *Majewski* approach to intoxication, and, by its absence (a negative significance), in the law on insanity and automatism. This in turn allows us to reveal the challenge posed by defendants who fall on the fault lines between intoxication on the one hand and insanity or automatism on the other.

As mentioned above, intoxication is (merely) evidence that may be raised by the defence to cast doubt on whether the Crown has proved the elements of the offence to the beyond reasonable doubt standard.²⁰ The law on intoxicated offending is notoriously complex. In England and Wales, it is structured across two axes.

14 Law Com DP, 2013 (n 4). See also England and Wales Law Commission, *Insanity and Automatism: A Scoping Paper* (Law Com SP 2012) and England and Wales Law Commission, *Insanity and Automatism: Supplementary Material to the Scoping Paper* (Law Com SP/SM 2012).

15 Law Com DP, 2013 (n 4) ch 6.

16 *ibid* [1.16]–[1.17].

17 *ibid* [6.1].

18 There are 9 jurisdictions in Australia, of which NSW and Victoria are by far the most populous. Although Australia has a federal criminal jurisdiction (and a Commonwealth Criminal Code), reflecting the origins of the states as separate British colonies, most criminal law is state-based.

19 *O'Connor* (1980) 146 CLR 64.

20 Thus, contrary to popular understanding (and popular press), intoxication is not a defence. Intoxication is most accurately understood as a doctrine of imputation, whereby the missing mental element of the offence may be imputed to the defendant. See Simester (n 3). See also Paul H Robinson, *Structure and Function in Criminal Law* (Clarendon Press 1997) 57–59.

The first axis is the cause of the intoxication (voluntary or involuntary) and, if the intoxication is voluntary, the second axis, which comprises the type of offence with which the defendant is charged (a 'specific intent' or 'basic intent' offence), is enlivened, determining whether evidence of intoxication is admissible. Evidence of voluntary intoxication may only be raised when a defendant is alleged to have committed a 'specific intent' offence. By contrast, if intoxication is involuntary, it may be adduced to cast doubt on whether the prosecution has proved that the defendant formed the *mens rea* required for any offence.²¹ Somewhat notoriously, the law of intoxication does not distinguish between intoxication by alcohol and intoxication by drugs, and, as we discuss below, has only relatively recently come to distinguish between intoxication by legal and illegal drugs.

This approach to the problem of intoxicated offending was set out by the House of Lords in *Majewski*, a decision that built on the earlier decision of *Beard*.²² While there was some initial uncertainty about the import of the detail of the *Majewski* judgments, and how evidence of voluntary intoxication is to be treated where an individual is charged with a 'basic intent' offence, it was the approach to 'basic intent' offences as those for which recklessness will suffice for liability that became the settled interpretation of *Majewski* and approach to the law on intoxicated offending.²³ And it is on this basis that, in the years since *Majewski* was decided, a sizeable body of case law has evolved, categorising crimes as either offences of 'specific' or 'basic' intent. This interpretation of *Majewski* has been questioned, with the Court of Appeal in *Heard* commenting *obiter* that 'specific intent' is aligned to 'ulterior intent', and defining 'specific intent' offences as those which require 'proof of a state of mind addressing something beyond the prohibited act itself, namely its consequences'.²⁴ As these different interpretations suggest, the meaning of the terms 'specific intent' and 'basic intent' may not be as precise as is sometimes assumed. Indeed, the Commission has admitted that the terms 'specific intent' and 'basic intent' are 'ambiguous, misleading and confusing'.²⁵ However, it concluded nonetheless that, when properly understood, they refer to genuinely different mental or fault elements for criminal offences, and maintained that evidence of intoxication should only be able to be adduced in relation to some offences and not others.²⁶ We return to the criticisms of the 'specific intent'/'basic intent' distinction below.

The *Majewski* approach to intoxicated offending rests on the basis that a defendant should not be entitled to rely on a lack of capacity where that incapacity was self-induced.²⁷ This is the notion of prior fault and it encodes the policy rationale of the legal treatment of intoxicated defendants. Under the *Majewski* approach to intoxicated offending, the defendant's prior fault lies at the heart of the law. The Law Commission refers to prior fault as a 'supervening principle' in the criminal law.²⁸ As is widely recognised, prior fault provides the moral-evaluative backbone of the law on intoxicated offending, and also informs the dividing line between intoxication and defences such as insanity and automatism. As the judgments of the Law Lords in *Majewski* indicate, voluntarily intoxicated defendants are, either overtly or in effect, to be blamed for getting drunk in the first place.²⁹ By contrast, and as we discuss further below, the law on insanity and automatism is

21 Involuntary intoxication has been narrowly defined to cover only intoxication that is the result of subterfuge or trickery—merely underestimating the effects of alcohol will not constitute involuntary intoxication. Further, even when intoxication is involuntary, it will not necessarily assist the defendant in casting doubt on the Crown case. As the court indicated in the high-profile decision of *Kingston*, involuntary intoxication will only assist the defendant if he or she would not have formed the *mens rea* for the offence in any case. See *Kingston* [1994] 3 All ER 353. As the jury found that Kingston had formed the requisite *mens rea*, the fact that his behaviour was affected by a drug administered without his knowledge was no defence. See further Loughnan, *Manifest Madness* (n 7) ch 7.

22 *Beard* [1920] AC 479.

23 The Lords seem to have used the terms 'specific intent' and 'basic intent' in three different ways, and articulated three different approaches to the way in which evidence of voluntary intoxication is to be treated where an individual is charged with an offence of 'basic intent': see further Loughnan, *Manifest Madness* (n 7) 187–188.

24 *Heard* [2007] 3 WLR 475, 485. According to the *Heard* approach to *Majewski*, the distinction between 'basic intent' and 'specific intent' offences is a distinction between 'intention as applied to acts considered in relation to their purposes' ('specific intent') and 'intention as applied to acts apart from their purposes' ('basic intent') ([485]).

25 Law Commission for England and Wales, *Intoxication and Criminal Liability* (Law Com No 214, 2009) [2.22].

26 *ibid* Law Com No 214, 2009, [2.22].

27 Law Com DP, 2013 (n 4) [6.4]. See generally Paul H Robinson, 'Causing The Conditions Of One's Own Defense: A Study In The Limits Of Theory In Criminal Law Doctrine' [1985] 71 Va L Rev 1.

28 *ibid*, Law Com DP, 2013 (n 4) [1.116].

29 '[T]he cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself'; *Beard* (n 21). As Simester (n 3) asks: '[D]oes D commit a crime on the basis of her intoxication?' Ashworth also asks: 'Is D to

structured around the absence (either assumed in the context of insanity or required in relation to automatism) of prior fault. The role of policy, and of prior fault, in *Majewski* made it controversial. The controversy arises because the law on intoxicated offending derogates from the principle of subjectivism, generally assumed to be cardinal in the criminal law.³⁰ As the Commission noted recently, what it called a strictly logical approach would mean that, where the requisite *mens rea* is absent as a result of intoxication, it would not be possible to establish criminal liability irrespective of the offence charged.³¹ By contrast, what the Commission called an absolutist view would equate moral culpability associated with the deliberate ingestion of intoxicants with legal culpability for the offence charged—again, no matter what the offence.³² The *Majewski* approach represents a compromise between these two positions, achieved via the imperfect categorisation of offences as either crimes of ‘specific intent’ or ‘basic intent’. In relation to voluntarily intoxicated defendants charged with ‘basic intent’ offences, an ingredient of the fact scenario is disregarded when determining liability. The effect of the law on intoxicated offending is such that, for the majority of cases—which consists of voluntarily intoxicated defendants charged with ‘basic intent’ offences—evidence of intoxication will be inadmissible. Further, while evidence of voluntary intoxication is admissible in relation to ‘specific intent’ offences, there may be a ‘basic intent’ offence which can function as a backup should the defendant not be convicted.³³

The problems with *Majewski* and prior fault were thoroughly documented by the Australian High Court when it considered whether to follow the House of Lords’ decision. The High Court adopted an alternative approach to the law on intoxicated offending—one that bypassed the categorisation of offences as ‘specific intent’ or ‘basic intent’, and the issue of the defendant’s prior fault in becoming intoxicated—in *O’Connor*, and this decision forms the basis of the law in Victoria.³⁴ In *O’Connor*, the High Court rejected the House of Lords’ decision of *Majewski*. *O’Connor* had been charged with stealing and wounding with intent to resist arrest, but was acquitted and found guilty of the statutory alternative of unlawful wounding. Adopting the approach to ‘specific intent’ formulated by Lord Simon (as ulterior intent—the ‘purposive nature of the proscribed act’³⁵), the leading judgment, given by the then Chief Justice, concluded that ‘the distinction between basic and specific intent is unhelpful as a basis for distinction of crimes by reference to *mens rea*’,³⁶ and opted instead not to classify defences as one or the other, and not to distinguish between voluntary and involuntary intoxication. According to *O’Connor*, intoxication will be admissible to assist the defendant to cast doubt on the prosecution case that the defendant’s acts were voluntary or whether the defendant had formed the *mens rea* required for the offence.³⁷

blame for becoming intoxicated or for causing the proscribed harm?’; Andrew Ashworth, *Principles of Criminal Law* (OUP 2009) 202. Although cf *Heard* (n 23): ‘there were . . . many difficulties in the proposition that voluntary intoxication actually supplies the *mens rea*, whether on the basis of recklessness as re-defined in *Caldwell* or on the basis of recklessness as now understood; if that were so the drunken man might be guilty simply by becoming drunk and whether or not the risk would be obvious to a sober person, himself or anyone else. That reinforces our opinion that the proposition being advanced was one of broadly equivalent culpability, rather than of drink by itself supplying the *mens rea*’.

30 See, generally, Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press 2001).

31 *DPP v Morgan* [1976] AC 182, 214 (Lord Hailsham); Law Com DP 2013 (n 4) [6.3]. See Law Com No 214, 2009 (n 24) [1.49]–[1.55]; and see generally Stephen Gough, ‘Intoxication and Criminal Liability: The Law Commission’s Proposed Reforms’ (1996) 112 LQR 335; and Ewan Paton, ‘Reformulating The Intoxication Rules: The Law Commission’s Report’ [1995] Crim LR 382.

32 Law Com DP, 2013 (n 4) [6.3]. See generally Alan Reed and Nicola Wake, ‘Potentiate Liability and Preventing Fault Attribution: The Intoxicated “Offender” and Anglo-American *Dépeçage* Standardisations’ [2014] John Marshall L Rev (forthcoming); John Child, ‘Drink, Drugs And Law Reform: A Review Of The Law Commission Report No. 314’ [2009] Crim LR 488, and Chester Mitchell, ‘The Intoxicated Offender – Refuting The Legal And Medical Myths’ (1988) 11 Int’l J Law & Psychiatry 77–103.

33 Law Com No 214, 2009 (n 24) ch 1 n 29.

34 After *O’Connor* (n 18), in 1995, NSW reverted to the approach outlined in *Majewski*, following the high-profile decision of *R v Paxman* (unreported, 21 June 1995, NSW District Court), in which a low sentence for the defendant’s manslaughter conviction was blamed on the availability of intoxication as an excuse. See further Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (3rd edn, Law Book Co 2010) 273.

35 *O’Connor* (n 18) 78 (Barwick CJ).

36 *ibid* 82 (Barwick CJ).

37 *ibid* 88 (Barwick CJ).

The Australian High Court's approach also entailed rejecting the notion of prior fault. In a compelling discussion that, in substance, amounts to an indictment of the notion, the Court identified two main problems with prior fault. First, the idea was considered to be problematic because it rests on a non-legal rather than legal conception of recklessness. According to the Court, taking 'alcohol or drugs with at least the risk of becoming intoxicated is in one sense a reckless thing to do, yet that variety of recklessness can scarce be carried forward and attributed as a substitute for actual intent to do the pro-scribed act'.³⁸ Second, the notion of prior fault was regarded as overly general. The court in *O'Connor* questioned whether the same kind of moral culpability (or perhaps we could say the degree of 'prior fault') pertained in all cases of 'self-induced intoxication'. Barwick CJ stated: 'It seems to me unsatisfactory to place all instances of intoxication as the result of a voluntary imbibing of alcohol or a voluntary administration of another drug in one undifferentiated classification as self-induced'.³⁹

As the *O'Connor* analysis of prior fault suggests, it is a rather problematic notion.⁴⁰ While part of the controversy in this area arises because the law on intoxicated offending derogates from the principle of subjectivism, the problems with prior fault are both deeper and more pervasive than that. Although it plays a central role in the law on intoxicated offending, as discussed, it has subsisted as a more or less nebulous moral notion. In such a state, it has been able to serve as something of a talisman in the criminal law on intoxicated offending, but viewed up close, and as *O'Connor* indicates, its moral and conceptual coherence seems to fall away. Further, as we suggest in relation to the recent recommendations advanced by the Law Commission (discussed below), attempts to imbue this notion with doctrinal precision may not deliver the certainty and coherency promised. While it may have a strong moral pull, the use of prior fault in criminal law should be subject to both careful definition and close scrutiny. We return to particular problems with prior fault in the final part of this chapter.

By contrast with the law on intoxicated offending, the criminal law's approach to insanity is structured around the (assumed) absence of prior fault. As is well known, the *M'Naghten* Rules⁴¹ provide that, in order to successfully raise insanity, the accused must prove, on the balance of probabilities, that 'at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as to not know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong'.⁴² The 'disease of the mind' limb of *M'Naghten* has been interpreted broadly, around the apparently technical and precise idea of an 'internal' as opposed to 'external' cause, a distinction which has been informed by consideration of the likelihood of recurrence and the prospect of violence.⁴³ Although not always articulated in such terms, an 'internal' cause is assumed to be something over which the defendant had no control, and thus for which he/she was not at fault. This is evident in what is excluded from insanity. Neither the direct acute effects of voluntarily consumed intoxicants, nor a diabetic's injection of insulin,⁴⁴ nor a 'psychological blow' (to an ordinary person)⁴⁵ are able to constitute a 'disease of the mind' and form the basis for the insanity defence. Somewhat controversially, a 'blanket exclusion of fault' operates where the defendant does not take medication resulting in a state of insanity ('non-compliance').⁴⁶ The court does not question whether the defendant was at fault in such non-compliance since the respective incapacity has been interpreted to be a consequence of the 'disease of the mind' as opposed to the defendant's failure to act.⁴⁷ This

38 *ibid* 85 (Barwick CJ).

39 *ibid* 74 (Barwick CJ).

40 See further Gerald Orchard, 'Surviving Without Majewski – A View from Down Under' [1993] Crim LR 426; *R v McCullagh* [2002] VSCA 163.

41 (1843) 10 Cl & Fin 200. See also *Oye* [2013] EWCA Crim 1725.

42 *M'Naghten*, *ibid* 210.

43 *Bratty v Attorney-General for Northern Ireland* [1963] AC 386. Lord Denning stated in *Bratty* that 'any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind' (*ibid* 412). The consideration of likelihood of recurrence—which is a concern with dangerousness—exposes the policy aspect of the law on insanity. For critical discussion, see Law Com DP, 2013 (n 4) [5.37].

44 See *Quick* (n 6).

45 *R v Falconer* (1990) 171 CLR 30, 55.

46 Mackay, *Mental Condition Defences and the Criminal Law* (n 12) 165–168.

47 *ibid*.

exclusionary fault approach has polarised opinion, and the Commission has rejected it for the purposes of the proposed RMC defence, considered in more detail below.

In relation to automatism, the significance of the absence of prior fault is more evident than in insanity, as it is a requirement of the defence. Exculpation on the basis of automatism is available only to those individuals who are unconscious or acting involuntarily—their loss of voluntary control must be total (albeit temporary)—and whose automatistic condition arises from an external (as opposed to internal) factor.⁴⁸ The most important aspect of automatism is, however, its third component part—the no prior fault requirement.

The no prior fault requirement for automatism is typically hidden in the definition of voluntariness. As only certain types of conduct (those for which the defendant is not at fault) will be regarded as 'involuntary', the descriptive aspect of automatism (was a defendant in a state of automatism?) obscures its moral-evaluative aspect (does he or she deserve to be held liable for the offence?).⁴⁹

Unrestricted to incapacity arising from a particular set of causes (such as mental illness), automatism is the most overtly morally-evaluative part of the 'mental incapacity terrain'.⁵⁰ Here, prior fault circumscribes exculpatory involuntariness for the purposes of automatism along moral culpability lines—and also ensures the scope of the doctrine lies in judicial hands.⁵¹ Although an intoxicated defendant may be in an automatistic state, because the intoxicated defendant is assumed to be at fault for his intoxication, he or she is dealt with via *Majewski*, as opposed to via the defence of automatism.⁵² In terms of policy objectives, the test for automatism was designed to 'protect society against recurrence of the dangerous conduct',⁵³ and has meant that automatism is now a particularly narrow defence.⁵⁴ A successful automatism plea results in an outright acquittal (whereas a range of disposal options is available to the sentencing judge if the defendant is found to be insane⁵⁵).

The contrasting legal position of intoxicated defendants and those defendants raising insanity or automatism was neatly articulated in the recent joint appellate court decision of *Coley, McGhee and Harris*.⁵⁶ Coley had been convicted of attempted murder and appealed his conviction. The appellant was a heavy user of cannabis and he played violent video games frequently. On the night of the alleged offence, after having smoked cannabis throughout the day, Coley entered his neighbour's home armed with a 'rambo' knife. He

48 *Smallshire* [2008] EWCA Crim 3217 [8].

49 Loughnan, *Manifest Madness* (n 7) 132.

50 *ibid.*

51 See further *ibid* ch 5.

52 *Coley* (n 8) [18]. The distinction between automatism and intoxication has been muddled by the use of the term automatism in a descriptive sense, to denote automatistic conduct or movement. On this basis, intoxication is sometimes called self-induced automatism. In this chapter, we refer to automatistic conduct and the defence of automatism, to distinguish between a description of behaviour and reference to the law. But see also Ronnie Mackay, 'Intoxication as a Factor in Automatism' [1982] Crim LR 146.

53 *Sullivan* [1983] 3 WLR 123; [1984] AC 156, 172 (Lord Diplock): 'It seems to us that if there is a danger of recurrence that may be an added reason for categorising the condition as a disease of the mind'; *Burgess* [1991] 2 All ER 769, [1991] 2 QB 92, 99. The validity of this distinction is questionable since it does not always follow that internal causes are likely to recur while external causes are not; Law Com DP, 2013 (n 4) [5.41]–[5.43]. See also *Harman* [2004] EWCA Crim 5217.

54 As Mackay has argued, the scope of the phrase 'disease of the mind' has ensured that most states of what can be described as automatistic behaviour (where the defendant is not in control of their actions) fall within the bounds of insanity (rather than the defence of automatism), and thus result in special verdicts/'not guilty by reason of mental incompetence' (as opposed to ordinary acquittals, which follow a successful automatism defence): see Mackay, *Mental Condition Defences in the Criminal Law* (n 12) 98.

55 Following the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (as amended by the Domestic Violence, Crimes and Victims Act 2004), the trial judge may issue a hospital order (with or without restriction), a supervision order or an absolute discharge.

56 *Coley* (n 8). For further discussion see Ronnie Mackay (note), 'R v Coley; R v McGhee; R v Harris: Insanity – Distinction Between Voluntary Intoxication and Disease of Mind Caused by Voluntary Intoxication' [2013] Crim LR 923; Sally Ramage (note), 'C v R, McGhee v R, Harris v R' (2013) Crim Lawyer 1; and Tony Storey, 'The Borderline Between Insanity and Intoxication' (2013) JCL 77, 194–201.

inflicted multiple stab wounds upon the victim, resulting in life-threatening injuries. In his evidence, Coley alleged that he had 'blacked out' and had no recollection of the events. Psychiatric reports indicated that, although Coley did not suffer from an underlying medical condition or personality disorder, it was possible that he had suffered a 'brief psychotic episode' triggered by his cannabis use, and that he may have been acting out the role of a character from a video game. The defence argued that a 'psychotic episode' is a 'defect of reason' attributable to a 'disease of the mind', which may have caused him to lose touch with reality, and thus, Coley might not have known the nature and quality of his act, or that what he was doing was wrong.⁵⁷ However, the trial judge ruled that this was a case of voluntary intoxication, rather than insanity or automatism and the Court of Appeal upheld the judge's decision, and Coley's conviction.⁵⁸ According to the Court, while the defendant might have suffered from a 'defect of reason', not every such defect is a 'disease of the mind' and, for 'pressing social reasons', 'direct acute effects on the mind of intoxicants, voluntarily taken, are not so classified'.⁵⁹ The defendant's condition could not give rise to an automatism defence because, as the Court of Appeal stated, 'quite apart from the fact that the evidence was of voluntary, if irrational action, the defence of automatism is not available to a defendant who has induced an acute state of involuntary behaviour by his own fault'.⁶⁰ For the Court of Appeal in *Coley*, there was a 'sharp distinction' between voluntary intoxication and automatism, with voluntary intoxication by alcohol or dangerous drugs representing an *a fortiori* case of culpable conduct, meaning that no further enquiry is needed into whether the defendant foresaw the potential consequences of consuming such intoxicants.⁶¹

As this case, and our discussion in this section, reveals, the idea of prior fault animates the law on intoxication, and structures the law on insanity and automatism by its absence. But, as we discuss below, some fractures are appearing in this edifice, and the neat distinctions and apparent clarity around prior fault that characterise the current law are under pressure.

Blurred Boundaries: The Challenges of Co-Morbidity

In this part of the chapter, we assess the approach to cases in which there is evidence that a defendant engaged in criminal conduct while he or she suffered from a 'disease of the mind', as required under the *M'Naghten* Rules, but also while intoxicated by drugs or alcohol. We suggest that these individuals challenge the sharp boundaries that currently structure this part of the criminal law. We then assess the Commission's recommendation that these defendants be dealt with by reference to that cause which was 'the most significant or prominent cause of the loss of capacity'. We suggest that, in some cases, the problems associated with discerning the 'predominant cause' of the defendant's incapacity will make it difficult to determine whether the new RMC defence or the *Majewski* approach is applicable. We also suggest that the Commission's assessment of co-morbid defendants masks a more pressing social concern; namely, that mentally impaired defendants who fail to meet the threshold for the RMC defence are at risk of being convicted of 'basic intent' offences in accordance with the prior fault principles. This issue cannot be resolved in the absence of reform to the law on intoxicated offending.

The starting point for this discussion is the evidence suggesting that co-morbidity is a significant issue for mentally ill and mentally impaired defendants facing criminal charges.⁶² The data available on mental

57 '[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act he was doing; or, if he did know it, that he did not know he was doing what was wrong'. *M'Naghten* (n 41). The fact that the episode was transient is irrelevant for the purposes of the insanity defence: '[I]nsanity which is temporary is as much insanity as that which is long-lasting or permanent'. *Coley* (n 8) [14].

58 *Coley* *ibid* [13]. Coley voluntarily took the cannabis. Hughes LJ noted: '[E]xternal factors inducing a condition of the mind and internal factors which can properly be described as a disease can give rise to apparently strange results at the margin'. *Coley* *ibid* [20].

59 *ibid* [17]–[18].

60 *ibid* [24].

61 *ibid* [19].

62 A recent Case File Review undertaken by the Sentencing Advisory Council (SAC) in South Australia indicated that the primary psychiatric diagnosis of defendants successfully raising mental incompetence defences was schizophrenia.

illness, substance abuse and criminality do suggest some connection between these things, although some of the studies done in this area have been subject to criticism.⁶³ Other studies suggest that the likelihood of offending by individuals who are mentally ill is greater among those who have a history of substance abuse.⁶⁴ It is important to note, however, that this is not the same as saying that mental illness or substance abuse or their combination *cause* criminal conduct. The relationships among these predisposing factors and criminal conduct are complex and the subject of ongoing scientific and other investigation.⁶⁵ The correlations among mental illness, drug and alcohol abuse and criminal conduct are nevertheless a significant cause for social concern.

In relation to the criminal law, there are two main areas of concern or uncertainty with respect to comorbidity.⁶⁶ The first pertains to defendants who are alleged to have committed offences when both mentally ill and intoxicated. The mental illness could have been both known and established by prior diagnosis or it may have been latent and stimulated to florid expression by the defendant's state of intoxication. The second area of concern relates to those defendants whose criminal conduct occurs after a course of habitual or intensive taking of drugs or alcohol, where that consumption has resulted in a more or less persistent or ongoing state of mental impairment, but where the defendant is not actually intoxicated at the time of the offence. The Commission analyses these situations as concurrent and successive 'causes of incapacity', respectively,⁶⁷ and we adopt that terminology here.

The case law from England and Wales and the Australian jurisdictions furnishes several examples of the difficulties caused by concurrent 'causes of incapacity'. In *Meddings*, the Victorian Supreme Court heard an appeal from an individual convicted of a non-fatal violence offence.⁶⁸ There was evidence that the defendant, who was epileptic, was drunk at the time of the attack. He sought an unqualified acquittal on the grounds of automatism, arguing that the alcohol had triggered an epileptic state in which his conduct was unconscious and involuntary. The trial judge had held that the jury should consider, as an alternative to acquittal on the ground of automatism, a special verdict of not guilty by reason of insanity, which would result in an order for Meddings' indefinite detention. The trial judge acknowledged that 'mere transient causes such as alcohol alone or anger alone would not result in a mental impairment defence within the meaning of the *M'Naghten Rules*', but held that, if the defendant had a disease predisposing him to a particular condition then, for the purpose of the defence of mental impairment (as insanity is known in Victoria), it does not matter whether

(47%) followed by drug-induced psychosis (15%) and bipolar disorder (10%) (there were often multiple diagnoses for individuals); and 80% of all individuals indicated that drugs and/or alcohol had been a problem for them in the past; and 73% of all individuals had ingested drugs and/or significant amounts of alcohol in the weeks or days leading up to the commission of the offence. See *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935* (n 10) [2.127] and, more generally, Appendix B.

63 See Jenny Mouzos, 'Mental Disorder & Homicide in Australia' (1999) 133 *Trends & Issues in Crime and Criminal Justice* (Australian Institute of Criminology) <<http://www.aic.gov.au/publications/current%20series/tandi/121-140/tandi133.aspx>> accessed 31 December 2013; Paul E Mullen, 'A Review of the Relationship between Mental Disorders and Offending Behaviours and on the Management of Mentally Abnormal Offenders in the Health and Criminal Justice Services' (2001) *Criminology Research Council* <<http://www.criminologyresearchcouncil.gov.au/reports/mullen.html>> accessed 31 December 2013; PJ Taylor and J Gunn, 'Homicides by People with Mental Illness: Myth and Reality' (1999) 174 *British J Psychiatry* 9; Lubica Forsythe and Antonette Gaffney, 'Mental Disorder Prevalence at the Gateway to the Criminal Justice System, Australian Institute of Criminology' [2012] 438 *Trends and Issues*.

64 See, for example, Cameron Wallace, Paul Mullen, and Phillip Burgess, 'Criminal Offending in Schizophrenia Over a 25-Year Period Marked by Deinstitutionalisation and Increasing Prevalence of Comorbid Substance Abuse Disorders' (2004) 161 *Am J Psychiatry* 4, 716-27. See also Michelle Edgely, 'Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Consistency and Coherency' (2009) 16 *Psychiatry, Psychology and Law* 240, 241-244.

65 Cameron Wallace, Paul Mullen, and Phillip Burgess, *ibid.* For a critical assessment of the relationship between mental disorder and crime, see Jill Peay, *Mental Health and Crime* (Routledge 2011) ch 4.

66 See further Attorney-General's Department, South Australia (2013) *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935* (SA), July 2013 [2.129].

67 Law Com DP 2013 (n 4) [6.81]-[6.90].

68 *Meddings* [1966] VR 306.

the trigger is a factor internal to the defendant or an external factor such as the consumption of alcohol.⁶⁹ The NSW Court of Criminal Appeal took a similar view in *Derbin*, in which it held that the defence of insanity was available to an individual with schizophrenia who committed an assault while in a psychotic state, where that state was triggered by a 'lethal cocktail of alcohol, cannabis and butane fume ingestion'.⁷⁰

This type of approach has also been adopted by the House of Lords, in the context of the partial defence of diminished responsibility.⁷¹ In *Dietschmann*,⁷² the defendant was convicted of killing the victim by repeatedly kicking and punching him in the head. At the time of the offence, Dietschmann was heavily intoxicated, and there was also evidence that he was suffering from a depressed grief reaction following the death of his aunt. On appeal, Lord Hutton stated that in such cases fact-finders should be directed to focus exclusively upon the effects of the defendant's underlying medical condition and to ignore the effects of the voluntary intoxication.⁷³

But it is not always the case that examples of co-morbidity will come down on the side of insanity or diminished responsibility. A controversial decision, adopting the opposing approach to co-morbidity, arose in South Australia, where the *M'Naghten* insanity defence has been reformulated as the defence of mental incompetence in the *Criminal Law Consolidation Act 1935*.⁷⁴ In *Police v Hellyer*, the defendant was charged with committing a burglary while intoxicated from the combined effects of alcohol and cannabis.⁷⁵ Medical evidence suggested that he was suffering either from a drug-induced psychosis or an evolving schizophrenic disorder at the time of his offence that may have been precipitated by his use of drugs and alcohol. Contrary to the decision of the magistrate, the appeal court judge concluded that the defence of mental incompetence was not open to Hellyer. According to the court, if the defendant suffered from mental disorder at the time of his offence, 'it was either directly induced by drugs or triggered by drugs'.⁷⁶

As these cases suggest, because a successful insanity defence brings certain disposal options, courts may be inclined to extend the application of the insanity defence in order to avoid the risk that dangerous individuals might gain a complete acquittal via the law on intoxicated offending. But uncertainty about the law—and concerns about its policy purposes—has led to calls to clarify the boundary between intoxication and insanity. These calls have been advanced in Victoria, South Australia and NSW. In Victoria, it appears that drug induced psychoses is not capable of giving rise to an insanity defence.⁷⁷ In South Australia, intoxication is

69 *ibid* 310. See also *R v Carter* [1959] VR 105. See further the discussion by His Honour, Justice Millstead, in 'Mental Competence', a paper presented to the law Society of South Australia, 21 March 2012 (SA Attorney General's Dept).

70 *R v Derbin* [2000] NSWCCA 361.

71 Homicide Act 1957, s 2. Recently, s 2 was amended by the Coroners and Justice Act 2009, s 52. See for discussion Loughnan, *Manifest Madness* (n 7) ch 9.

72 *Dietschmann* [2003] 1 AC 1209. See also *R v Wood* [2008] EWCA (Crim) 1305; [2008] 2 Cr App R 34, 507; *R v James Stewart* [2009] EWCA (Crim) 593; [2009] 2 Cr App R 30. These cases pre-date the amendments made to s 2 of the Homicide Act 1957 by s 52 of the Coroners and Justice Act 2009. However, the cases of *R v Dowds* [2012] EWCA Crim 281 and *R v Asmelash* [2013] EWCA Crim 157 (loss of control) imply that the approach adopted in *Dietschmann* will continue to apply.

73 '[I]f the defendant satisfies the jury that, notwithstanding the alcohol he had consumed and its effect on him, his abnormality of mind substantially impaired his mental responsibility for his acts in doing the killing, the jury should find him . . . guilty of manslaughter. I take this view because I think that in referring to substantial impairment of mental responsibility, the subsection does not require the abnormality of mind to be the sole cause of the defendant's acts in doing the killing. In my opinion, even if the defendant would not have killed if he had not taken drink, the causative effect of the drink does not necessarily prevent an abnormality of mind suffered by the defendant from substantially impairing his mental responsibility for his fatal acts'. *Dietschmann*, *ibid* 1216–1217.

74 See Section 269C *Criminal Law Consolidation Act 1935* (SA).

75 *Police v Hellyer* [2002] SASC 61.

76 *ibid* [92]. The court concluded that Hellyer's mental state had to be characterised as intoxication, defined in the 1935 Act as 'a temporary disorder, abnormality or impairment of the mind' resulting from the consumption or administration of intoxicants, one that will pass on 'metabolism or elimination' of the intoxicants from the body. *ibid* [92].

77 See *Martin* (No. 1) (2005) 159 A Crim R 314, *Sebalj* [2006] VSCA 106 (2 May 2006), and *Whelan* [2006] VSC 319 (27 April 2006), Victorian Law Reform Commission Consultation Paper, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (VLRC CP 2013) para 5.50, and Victorian Law Reform Commission, *Defences to Homicide* (2004) para 5.42. In this Review, the Victorian Law Reform Commission considered whether to include a statutory definition of mental impairment in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* which governs the mental impairment defence in Victoria.

excluded from the definition of mental illness provided in the statute, and a new consultation paper published by the Attorney-General's Department seeks comment on whether to specifically exclude drug-induced incapacity from the scope of the defence of mental incompetence.⁷⁸ Recently, in NSW, the NSW Law Reform Commission recommended codification of the law on intoxicated offending in the context of the *M'Naghten* Rules.⁷⁹ This recommendation formed part of a raft of proposals centered upon a revised and updated version of *M'Naghten* insanity (known as the defence of mental impairment in NSW).⁸⁰ Currently, the position in NSW is that substance abuse disorders (addiction to substances), and the transient effects of the consumption of such substances, are incapable of satisfying the mental impairment defence.⁸¹ The recommendations would amend the Mental Health (Forensic Provisions) Act 1990 (NSW) such that these conditions would be statutorily excluded from the mental illness defence.⁸² The defendant's substance abuse would have to reach the level at which it has resulted in brain damage or induced an alternative mental impairment (for example, drug induced psychoses) (a 'substance induced mental disorder') before the defence would be available.⁸³ This is problematic since it places insanity beyond the reach of the defendant with a substance addiction, and in effect assumes that the alcohol or drug dependent defendant is responsible for his or her addiction – unless or until it has become so serious as to have caused brain damage or another mental disorder.

This punitive approach to alcohol dependent defendants was adopted in England and Wales⁸⁴ until it came under fire by the House of Lords in *Dietschmann* (which, as mentioned above, concerned the diminished responsibility defence, not the insanity defence).⁸⁵ Subsequently, the Court of Appeal in *Wood*,⁸⁶ and *Stewart*⁸⁷ held that it was unnecessary for habitual substance misuse to have resulted in brain damage or a secondary medical condition before the diminished responsibility could apply. In cases involving alcohol dependence syndrome, jurors should now be directed to 'focus exclusively on the effect of alcohol consumed by the defendant as a direct result of his illness or disease and ignore the effect of any alcohol consumed voluntarily'.⁸⁸ Although this approach represents a more 'empathetically valid' perspective than that which prevailed prior to *Dietschmann*, it requires potentially perplexed jurors to engage in the arguably impossible task of determining 'the degree of voluntariness and involuntariness in the defendant's drinking'.⁸⁹

The case law similarly demonstrates that successive 'causes of incapacity' also challenges any neat distinction between the law of insanity and intoxicated offending. In the Queensland case of *Re Clough*, the court was presented with the problem of co-morbidity arising from the defendant's prior use of cannabis and methylamphetamine in combination with his pre-existing psychotic disorder.⁹⁰ The Mental Health Court concluded that the defendant was not intoxicated at the time of the offence. He killed his wife during a psychotic episode, which occurred one or two days after his last use of methylamphetamine, by when the drug had been metabolized or eliminated from his body. The Judge of the Mental Health Court found

78 See the Criminal Law Consolidation Act 1935 (SA) s 269A (defence of mental incompetence), and discussion in *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935* (SA), July 2013 (n 10) [2.126]–[2.152].

79 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences* (NSWLRC No 138 2013) ch 4 <<http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report%20138.pdf>> accessed 21 December 2013.

80 The revised version of *M'Naghten* would be incorporated into the *Mental Health (Forensic Provisions) Act 1990*. For assessment of the NSWLRC's proposals, see Arlie Loughnan, 'Reforming the Criminal Law on Mental Incapacity' (2013) 25 *Current Issues in Crim Justice* 703.

81 *Radford* (1985) 42 SASR 266, 274. See also *Falconer* (n 44) 53–54, 78, 85.

82 NSWLRC No 138, 2013 (n 74) [4.87].

83 *ibid* paras 3.82–3.85.

84 *R v Tandy* [1989] 1 WLR 350 (CA), (1988) 87 Cr App R 45 (CA).

85 *Dietschmann* (n 71).

86 *Wood* (n 71).

87 *Stewart* (n 71).

88 *Wood* (n 71) [41].

89 Alan Reed and Nicola Wake, 'Anglo-American Perspectives on Partial Defences' in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2011) 189; and Andrew Ashworth, 'Diminished Responsibility: Defendant Diagnosed as Suffering from Alcohol Dependency Syndrome but Having Sustained No Brain Damage as Result' [2008] *Crim LR* 976, 978.

90 *Re Clough* [2007] QMHC 002.

that 'intoxication' included the secondary effect of amphetamine consumption, described as a 'cerebral disturbance', from which Clough was suffering at the time of the killing. The trial judge was satisfied that Clough had intentionally caused himself to be intoxicated with methylamphetamine and therefore could not rely on either the defence of insanity or diminished responsibility as contained in the Queensland Criminal Code to deny criminal responsibility for the killing. On appeal, counsel for Clough argued that the first instance judge should have found that the mental impairment provisions did apply because the appellant was not intoxicated at the relevant times. The Court of Appeal rejected the argument. In a decision that evokes the South Australian approach in *Hellyer*, the Court held that the ordinary meaning of 'intoxication' was 'wide enough to encompass more than a comparatively short-term elation or stimulation', and that intoxication under the legislation included 'the secondary effect of amphetamine consumption from which the appellant was suffering at relevant times'.⁹¹

The issue of successive 'causes of incapacity' was also considered in the Court of Appeal case of *Coley*,⁹² outlined above. In a way that is similar to *Meddings*, their Lordships distinguished between drunkenness *simpliciter* and the level of impairment required to satisfy the *M'Naghten* Rules. The Court, referring to the earlier cases of *Davis*⁹³ and *Beard*,⁹⁴ reiterated that in cases where intoxication results in a recognised mental impairment, for example, *delirium tremens*, the insanity defence ought to be left to the jury.⁹⁵ For the purposes of the defence, it is irrelevant whether the impairment is temporary. However, not all medical conditions will be capable of satisfying the 'disease of mind' requirement. LJ Hughes urged caution where expert testimony refers to 'psychosis' or 'psychotic' conditions which may be used to describe symptoms of the defendant's preexisting medical condition, as in the case of *Derbin*,⁹⁶ or alternatively, to denote a state of mind induced by drug abuse, as in the case of *Coley*.⁹⁷ In the latter case, it is the *Majewski* approach rather than the insanity defence that applies.

In relation to both successive and concurrent 'causes of incapacity', the overarching principles of criminal liability in this area appear to suggest that where the defendant's incapacity is induced by a mental disorder, the *M'Naghten* Rules or the insanity defence should apply. In contrast, where the defendant's incapacity was induced by voluntary intoxication the *Majewski* approach is applicable. But the apparent neutrality of this statement masks the differences in the ways in which the criminal law focuses on causes and effects of incapacity. When intoxication is a factor, the law focuses on the cause of the incapacity (voluntary or involuntary consumption, dangerous or non-dangerous drugs), while, except for dividing cases between insanity and automatism, cause is less of a preoccupation (perhaps we can say it has reduced moral salience) in relation to mental disorder.⁹⁸ But, arguably, the moral salience of causes of incapacity should either matter or not matter, but do so consistently. In our opinion, we should question whether causes of incapacity should be such a (variable or) prominent feature of the criminal law, as is the case in relation to intoxicated offending: given that the self-narrative of criminal law doctrines and practices is that they apply to autonomous and agentic individuals, it seems that what should matter is the individual's incapacity, with factors such as causes of incapacity perhaps best addressed at sentencing.

The problems with the current law of insanity and automatism in England and Wales have prompted the Commission's self-described 'radical' reform proposals.⁹⁹ According to the Commission's recommendations, the current common law rules on automatism and insanity would be replaced with two new statutory defences of 'not criminally responsible by reason of recognised medical condition', and a reformulated automatism defence.¹⁰⁰ The defendant seeking to rely on the RMC defence must adduce expert evidence on which, in the opinion of the court, a properly directed jury could conclude that at the time of the alleged offence the

91 *R v Clough* (No 2) [2010] QCA 120 [14].

92 *Coley* (n 8) [15]. It is worth noting here that the Law Commission identifies a second type of successive incapacity where insanity induces a state of intoxication; Law Com DP 2013 (n 4) [6.82]. See also *Kingston* (n 20).

93 *Davis* (1881) 14 Cox CC 563.

94 See *Beard* (n 21).

95 *Coley* (n 8) [15].

96 *Derbin* (n 69).

97 *Coley* (n 8) [16].

98 We are grateful to Andrew Ashworth for this point.

99 Law Com DP 2013 (n 4) [1.85].

100 *ibid* [5.123].

defendant wholly lacked the capacity: (i) to form a judgment about the relevant conduct or circumstances; (ii) to understand the wrongfulness of what he or she is charged with having done; or (iii) to control his or her physical acts in relation to the relevant conduct or circumstances as a result of a qualifying and recognised medical condition.¹⁰¹ The burden of proof would be on the party raising the defence, and, if there was sufficient evidence to leave the defence to the jury, the prosecution's standard of disproof would be the criminal standard.¹⁰² This is a significant (but arguably appropriate and positive) departure from the current law, which requires the defendant to prove insanity to the civil standard, and it casts doubt upon the sustainability of the reverse burden in diminished responsibility cases.¹⁰³

In order to successfully plead the RMC defence, the defendant must suffer from a 'qualifying' as well as 'recognised' medical condition.¹⁰⁴ The trial judge is charged with considering whether the condition qualifies for the purposes of the affirmative defence.¹⁰⁵ As the Commission itself acknowledges, the multidimensional nature of mental incapacities renders it difficult to determine whether a particular condition has reached the level of a recognised medical condition, and divergence in syndrome and criterion levels in the world-leading DSM-V and ICD-10 manuals exacerbate this problem.¹⁰⁶ In light of these difficulties it is perhaps inevitable that the individual perception of the medical practitioner impacts upon diagnoses, which may result in conflicting expert testimony at trial. This problem is compounded by the fact that on grounds of public policy not all recognised medical conditions 'qualify' for the purposes of the new defence.¹⁰⁷ The new proposals exclude voluntary acute intoxication, and conditions manifested solely or principally by abnormally aggressive or seriously irresponsible behaviour, from satisfying the affirmative defence and the trial judge has the discretion to exclude other medical conditions on public policy grounds.¹⁰⁸ These recommendations reflect the general consensus that the 'recognised medical condition' requirement of the recently reformulated diminished responsibility plea ought to have been statutorily qualified to exclude voluntary acute intoxication, as is the case in relation to the substantial impairment by abnormality of mind defence in NSW.¹⁰⁹ It might be preferable for the proposals to stipulate that acute intoxication does not prevent the availability of the affirmative defence where the defendant suffers from an alternative medical condition that is capable of satisfying the remaining criteria of the plea.

If the defendant's condition 'qualifies' for the purposes of the new defence, expert evidence will be required to inform the fact-finders' determination as to whether that condition existed at the time of the alleged offence, and whether it could have caused a lack of the relevant capacity in relation to the charge.¹¹⁰ The defendant must provide evidence that the condition is recognised by two medical experts, thereby circumventing the reverse burden of proof which currently applies in the context of the insanity defence.¹¹¹ In both cases where

101 *ibid* [4.160]. The wide ambit of the proposed RMC defence has resulted in recommendations for a narrower automatism defence (*ibid* [5.1]), which we discuss below.

102 *ibid* [4.163].

103 Andrew Ashworth, 'Insanity and Automatism: A Discussion Paper' [2013] Crim LR 787. See also *Foye* [2013] EWCA Crim 475, and Andrew Ashworth, '*R v Foye* (Lee Robert): Diminished Responsibility – Homicide Act 1957 s 2(2)' [2013] Crim LR 839.

104 Law Com DP, 2013 (n 4) [4.160].

105 *ibid* para 4.79.

106 Law Com DP, 2013 (n 4) [4.69] and [4.74] respectively.

107 *ibid* [4.158]–[4.161]. See also *Dowds* (n 71) [31].

108 *ibid* [4.158]–[4.161]. There is concern as to the manner in which the 'acute intoxication' and 'antisocial personality disorder' exclusionary clauses will be applied in practice. The Law Commission states that 'acute intoxication should not, of itself, constitute a qualifying medical condition'. *ibid* [4.93]. This statement is likely to refer to the fact that the acute intoxication exclusion is not designed to prevent the availability of the defence where another recognised medical condition is present, but it would be preferable to make this explicit in the proposals. This could be done by stating that the fact that at the time of the offence the defendant was (a) acutely intoxicated or (b) suffering from a condition manifested solely or principally by abnormally aggressive or seriously irresponsible behaviour, does not (i) constitute a recognised medical condition, or (ii) prevent such a condition from being established for the purposes of the RMC defence.

109 See Nicola Wake, 'Recognising Acute Intoxication As Diminished Responsibility? A Comparative Analysis' [2012] JCL 71–98. See also Nicola Wake (note), 'Diminished Responsibility: Raising the Bar?' [2012] JCL 76, 197–202; *R v Asmelash* (n 71).

110 Law Com DP, 2013 (n 4) [4.118]. The Court of Appeal recently reaffirmed the importance of expert evidence at such trials in the context of the diminished responsibility defence. *R v Bunch* [2013] EWCA Crim 2498.

111 Law Com DP, 2013 (n 4) [4.67]. See also Ashworth, 'Insanity and Automatism: A Discussion Paper' (n 102).

intoxication and a recognised medical condition arise in succession or concurrently, jurors would be directed to assess whether the intoxication or the mental illness is the most significant cause of the defendant's lack of capacity.¹¹² If the disorder is the most significant cause, the defendant would be found 'not criminally responsible by reason of recognised medical condition', assuming the remaining elements of the defence are satisfied. In contrast, where voluntary intoxication is the most significant or prominent cause of the incapacity, the *Majewski* approach will apply.¹¹³

The Commission's proposal that the 'predominant cause' approach should be adopted in *all* co-morbidity cases is deceptively simple. As the foregoing analysis demonstrates, in some cases determining the most significant cause of a defendant's incapacity will be difficult, particularly where the condition is one that is inextricably linked to the consumption of intoxicants.¹¹⁴ The Commission's recommended approach is currently used in cases where both automatism and insanity are open on the facts, but it is not without its problems. In some cases, it might be difficult to discern the predominant cause of the respective incapacity. In the case of *Roach*, the defendant was charged with wounding with intent to do grievous bodily harm under Section 18 of the Offences Against the Person Act 1861.¹¹⁵ Following an altercation, the defendant stabbed his supervisor in the neck and shoulder in what was described by one witness as a 'psycho-style' stabbing action. Expert testimony suggested that the defendant's incapacity was consequent upon the defendant's mixed personality disorder, long-standing sensitivity to humiliation and aggressive authority figures, and a mixture of non-dangerous drugs (Carbamazepine (Tegretol) and Paroxetine (Seroxat)) and alcohol.¹¹⁶ The prosecution asserted that if the defendant was acting in a state of automatism it was 'Insane Automatism of the Psychogenic Type'.¹¹⁷ The defence, in contrast, argued that the contributory effect of the alcohol and non-dangerous drugs combined with the defendant's pre-existing personality disorder indicated that the defendant was in a state of automatism at the time of the offence.¹¹⁸ The trial judge refused to leave the issue of automatism to the jury and the defendant was subsequently convicted. The conviction was quashed on appeal on account of judicial errors, including, *inter alia*, the trial judge's failure to leave automatism to the jury where external factors operated on an underlying condition that might not have otherwise resulted in an automatistic state.¹¹⁹ Thus, as stated in *Pooley*,¹²⁰ concurrent causes of incapacity permit automatism to be left to the jury 'even if one of the concurrent causes is self-induced'.¹²¹

Ultimately, the Commission's narrow terms of reference and its focus on the approach which ought to be adopted in this type of case detracts from the more pressing concern regarding the significant difference in outcome for defendants who satisfy the requirements of the new defence and those who do not. Defendants who are regarded as mentally ill are entitled to a defence and are more likely to receive treatment following a special verdict, whereas those who do not meet the threshold for the RMC defence (or, as it is currently, the insanity defence) may be convicted and sentenced in accordance with the *Majewski* approach.¹²² In this regard, clarifying the approach which ought to be adopted in this type of case is desirable, but it does not resolve the fundamental problem that in many borderline cases where intoxication presents as a predominant cause of the defendant's incapacity he or she may be convicted in line with the prior fault principles, notwithstanding his or her mental abnormality. This problem cannot be resolved in the absence of reform to the law on intoxicated offending.

112 Law Com DP, 2013, *ibid* [4.160].

113 *ibid* [6.68].

114 *ibid* [6.87].

115 *Roach* [2001] EWCA Crim 2698, [2001] All ER (D) 98.

116 *ibid* [13].

117 *ibid* [16].

118 *ibid* [17].

119 *Ibid* [30].

120 *Pooley*, unreported, Jan 16 2007 Aylesbury Crown Court (cited in Law Com DP, 2013 (n 4) [5.62]).

121 Law Com DP, 2013 *ibid* [5.62].

122 The result is that this type of defendant is less likely to receive appropriate treatment, their condition may deteriorate and they may be more prone to recidivism. See generally The Bradley Report, *Lord Bradley's Review of People with Mental Health Problems or Learning Difficulties in the Criminal Justice System* (2009) <<http://www.rcpsych.ac.uk/pdf/Bradley%20Report11.pdf>> accessed 22 December 2013. It is worth noting that treatment may be provided to these defendants under the Mental Health Act 1983. We are grateful to Jesse Elvin for this point.

Prior Fault: Non-Dangerous Drugs and Non-Compliance with Medication

In this section, we critically assess the role of prior fault in the criminal law on intoxication, insanity and automatism. A rather fraught fault line exists between cases involving defendants who take non-dangerous drugs (e.g., prescription medication, sedative and soporific drugs) and those who deliberately fail to comply with a prescribed medication regimen. As mentioned above, while voluntarily intoxicated defendants have not been able to rely on the defence of automatism, on the basis that their automatistic condition is in some sense their own fault, it is not clear that all intoxicated defendants can be assumed to be culpable in this way. In this section, we suggest that re-inscribing the ostensibly bright-line divide between those who are at fault for their automatistic conduct and those who are not via the use of 'recognised medical condition' is not straightforward, and may not achieve the requisite clarity and certainty desired by the law reform process.

The starting point for this part of our discussion is the current prominence of intoxication by non-dangerous drugs (including prescription medication) in appellate level decisions concerning intoxicated defendants. As mentioned above, it has not been possible to make the same assumptions about knowledge of the effects of these drugs, and culpability for conduct taking place when intoxicated by them is not straightforward. As a result, the courts have come to consider whether the defendant was *reckless* in taking the drugs, and/or failing to eat where medication must be taken before/after/with food. In *Burns*,¹²³ the court was presented with the problem of incapacity arising from the defendant's clinical alcoholism, combined with his consumption of alcohol and a mixture of Mandrax tablets and other pills containing morphia or morphine. The defendant had rugby tackled the victim to the floor, where he lay on top of him trying to kiss him. Although the victim managed to break free, the defendant caught him and declared that he was aroused and would wait all night until the victim succumbed to his advances. Expert testimony suggested that the defendant may not have known what he was doing partly because of brain damage caused by the alcoholism and partly because of the drink and drugs. The trial judge directed the jury as follows:

It is for the defence to satisfy you on a balance of probabilities that the appellant was unaware of what he was doing and that unawareness was caused by disease of the mind; if you consider, however, that there is evidence that his unawareness was caused at least partly by factors other than a disease of the mind, then it is for the prosecution to satisfy you beyond reasonable doubt that he knew what he was doing.¹²⁴

It is difficult to align this approach with the *M'Naghten* Rules and the *Majewski* approach to intoxicated offending. It is unclear how the defendant would be entitled to a complete acquittal in this situation.¹²⁵ Mackay suggests that the case should have been interpreted as one involving non-dangerous drugs, alcohol, and insanity, and thus that the court should have considered whether the consumption of the non-dangerous drug was reckless.¹²⁶ Indeed, the Court of Appeal in *Roach* explained that the issue of automatism should have been considered as a separate issue from insanity, since the consumption of alcohol and non-dangerous drugs in a situation where the defendant does not appreciate the effects may be a basis for the defence,¹²⁷ with a successful plea resulting in a normal (outright) acquittal.

In *Bailey*,¹²⁸ a diabetic defendant struck the victim with a lead pipe during the course of a hypoglycaemic attack, which had been precipitated by the defendant's failure to take sufficient food after his earlier insulin injection. As Lord Justice Griffiths stated, the relevant consideration is the defendant's subjective recklessness:

[I]t seems to us that there may be material distinctions between a man who consumes alcohol or takes dangerous drugs and one who fails to take sufficient food after insulin to avert hypoglycaemia. It is common knowledge that those who take alcohol or drugs to excess may become aggressive or do dangerous and unpredictable

¹²³ *Burns* (1974) 58 Cr App R 364.

¹²⁴ *Burns*, *ibid* 374–375.

¹²⁵ See David Ormerod, *Smith and Hogan's Criminal Law* (OUP 2011) 327–330.

¹²⁶ Mackay, *Mental Condition Defences in Criminal Law* (n 12) 158–159. See also Law Com DP, 2013 (n 4) [6.83]. See also *Hardie* (n 6).

¹²⁷ *Roach* (n 114) [17].

¹²⁸ *Bailey* (n 6).

things. But the same cannot be said without more of a man who fails to take food after an insulin injection. If he does appreciate the risk that such a failure may lead to aggressive, unpredictable and uncontrollable conduct and he nevertheless runs the risk or otherwise disregards it, this will amount to recklessness.¹²⁹

Taking into account the defendant's subjective recklessness will mean that, as the Court of Appeal stated in *Quick*,¹³⁰ jurors must consider the defendant's fault in failing to follow the doctor's instructions, whether he or she was aware that he/she was entering into a hypoglycaemic state, and whether he/she could have prevented the incapacity.¹³¹ By imputing liability on the basis of the defendant's responsibility to manage his own illness in such cases, the *Bailey* and *Quick* approaches may be viewed as an attempt to extend the controversial *Majewski* approach.

However, it has not proved possible to get recklessness to do all the sorting work required in these types of cases. In *Hardie*, Lord Justice Parker stated:

It is true that Valium is a drug and it is true that it was taken deliberately and not taken on medical prescription, but the drug is, in our view, wholly different in kind from drugs which are liable to cause unpredictability or aggressiveness. It may well be that the taking of a sedative or soporific drug will, in certain circumstances, be no answer, for example in a case of reckless driving, but if the effect of a drug is merely soporific or sedative the taking of it, even in some excessive quantity, cannot in the ordinary way raise a conclusive presumption against the admission of proof of intoxication for the purpose of disproving *mens rea* in ordinary crimes, such as would be the case with alcoholic intoxication or incapacity or automatism resulting from the self-administration of dangerous drugs.¹³²

As this extract suggests, *Hardie* may be contrasted with *Burns*, *Bailey*, and *Quick*. According to the Law Commission, the divergence in the legal treatment of defendant's taking non-dangerous drugs and those failing to comply with medication, and the 'illogical and inconsistent' verdicts that result, cannot be justified.¹³³

In response to perceived problems exposed by the line of case law dealing with intoxication by non-dangerous drugs, the Commission initially proposed what may be considered a technical solution. In 2009, it recommended that intoxication by non-dangerous drugs be deemed to be cases of *involuntary* intoxication.¹³⁴ In its 2013 Discussion Paper, however, the Commission withdrew this idea. It has now proposed two related changes to the law. The first change is to the scope of the automatism defence, which will not be available to a defendant whose incapacity can be attributed to any kind of medical condition. The second change is to the boundary between involuntary intoxication and the new RMC defence. Under the Commission's proposals, the RMC defence would be available to the defendant who becomes (involuntarily) intoxicated through the proper use of non-dangerous drugs, and to the defendant who has a valid reason for failing to take prescribed medication ('non-compliance').¹³⁵ This second proposed change represents a significant departure from the Commission's 2009 position, and the exclusionary fault approach adopted in relation to the insanity defence, referred to above. The Commission's 2009 suggestions would have entitled individuals in the former category to an acquittal, should it not have been possible for the prosecution to prove beyond reasonable doubt that he or she formed the requisite *mens rea*. The latter category of defendant would have been entitled to plead insanity (irrespective of the reason for non-compliance) on the basis that it was his or her 'disease of the mind', rather than his or her omission, that caused the incapacity. We consider the first and second proposed changes in turn.

The first of the Commission's proposed changes is the redrawing of the boundary around automatism. Under the Commission's proposals, automatism would continue to be orientated around the absence of prior

129 *ibid* (n 6).

130 *Quick* (n 6).

131 *ibid* 923; see also Law Com DP, 2013 (n 4) [6.12]–[6.28].

132 *Hardie* (n 6) 70.

133 Law Com DP, 2013 (n 4) [1.41], [6.50], [6.77].

134 See Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) [3.125(4)] and [3.128]–[3.136].

135 Law Com DP, 2013 (n 4) [6.42] and [6.46] respectively.

fault, but, in addition, the new defence would also require that a medical condition is not the source of the incapacity. The new automatism defence would be available where the defendant raises evidence that at the time of the alleged offence he or she wholly lacked the capacity to control his or her conduct, and the loss of capacity was not a result of a recognised medical condition (of any kind).¹³⁶ As this suggests, the defence would no longer require an 'external' rather than 'internal' cause, a distinction which the Commission labels 'incoherent' and 'overly-simplistic'.¹³⁷ This effectively moves all cases of automatistic behaviour following consumption of non-dangerous drugs out of the category of automatism, where the defendant has a 'recognised medical condition'. As the Commission acknowledges, the new defence would be 'much narrower' than the existing defence (perhaps limited to reflexes, spasms and convulsions, or what the Commission refers to as transient states and circumstances¹³⁸), as the broad ambit of the proposed RMC defence restricts the scope of automatism.¹³⁹ The new automatism defence would only apply where the automatistic conduct resulted from something other than a recognised medical condition, or the voluntary consumption of intoxicants.¹⁴⁰ The Commission claims that the new automatism defence and the RMC defence are 'mutually exclusive', and that the circumstances 'in which automatism occurs together with a recognised medical condition or with intoxication, either in succession or concurrently, should occur rarely, if at all'.¹⁴¹

The second of the Law Commission's proposed changes concerns the boundary between intoxication and the new RMC defence: the Commission's proposed law reform would shift the boundary between intoxication and insanity to expand the former and shrink the latter. As it is at present, failure to take medication, as in the case of *Hennessy* (in which the defendant suffered from hyperglycaemia, having failed to take insulin), leaves it open to the defendant to raise insanity (on the basis that his or her incapacity is the result of an 'internal' cause, for example, diabetes).¹⁴² The Commission proposes that in cases where the consumption of non-dangerous drugs results in an unforeseen incapacity, the defendant will be eligible to raise the RMC defence. This redraws the lines in this area of criminal law, meaning that a normal acquittal will not be available to this sort of intoxicated defendant, a change the Commission considers justified on the basis that the trial judge requires a number of disposal options for use in appropriate cases.¹⁴³ As this rationale suggests, the question of disposal is driving the substantive law. The absence of disposal powers following an automatism defence, for instance, has long been a source of concern,¹⁴⁴ and, as mentioned above, the availability of disposals

136 *ibid* [5.124] (Proposal 13).

137 *ibid* [5.70] and [5.71] respectively.

138 *ibid* [5.110].

139 *ibid* [6.30]. As a matter of practice, the defence would thus be available only to automatic reflex actions or transient states or circumstances. *ibid* [5.110].

140 *ibid* [5.106]. This would mean that a defendant who commits an assault and suffers from PTSD would no longer be able to raise automatism, assuming PTSD is accepted as a 'recognised medical condition'. *ibid* [5.67]. The exclusion of voluntarily consumed intoxicants is implicit in the Commission's exclusion of (qualifying or non-qualifying) recognised medical conditions for the purposes of the RMC defence. Acute intoxication arguably falls into the category of a non-qualifying medical condition. As with the RMC defence, it might be preferable for the Commission to explicitly exclude acute intoxication in the context of the proposed automatism defence.

141 *ibid* [5.119] and [6.84] respectively.

142 *Hennessy* [1990] 2 All ER 9, 292. *Hennessy* had argued that he had forgotten his medication due to stress, anxiety and depression, and claimed that he should be able to raise automatism. The Court of Appeal approved the trial judge's ruling that stress, anxiety and depression, separately or cumulatively, are incapable of producing a state of automatism. The court noted that barring the 'features of novelty or accident', such states of mind are 'prone to recur' and therefore the appropriate defence would be one of insanity. Similarly, in *Rabey* (1977) 37 CCC2d 461, the court ruled that rejection by a love interest is part of 'the ordinary stresses and disappointments of life which are the common lot of mankind'. Subsequently, in *T* [1990] Crim LR 256, the court was required to consider the case of a defendant who was suffering from post-traumatic stress disorder as a result of being raped three days prior to the commission of the alleged offence. The court concluded that post-traumatic stress disorder in a normal person arising from an act of violence is an external factor for the purposes of the automatism defence.

143 Law Com DP, 2013 (n 4) [6.48]. For example, Quick's incapacitated state was categorised as one of sane automatism, despite the fact that he had 'on 12 or more occasions ... been admitted to hospital either unconscious or semi-conscious due to hypoglycaemia'; (n 6), 350 [authors' emphasis added]. See generally Ronnie Mackay and Markus Reuber, 'Epilepsy and the Defence of Insanity: Time for Change?' [2007] Crim LR 782, 792.

144 Norrie (n 29) 182.

following a successful insanity plea has driven the courts' approach to co-morbidity in several common law jurisdictions.

This significant change is clearly articulated in Proposal 14 of the Commission's recommendations. The RMC defence would apply in cases where the defendant totally lacked the relevant capacity for an offence charged as a result of ingesting a properly authorised medicine for treatment of his/her recognised medical condition. The defendant must have ingested the medicine or drug in accordance with a prescription, advice given by a qualified practitioner and/or in accordance with the instructions accompanying over-the-counter medication. The defence will remain available where the defendant did not comply with the instructions, providing that his conduct was reasonable in the circumstances. Further, the defendant must have no reason to believe that the medication would induce an adverse reaction that could cause him/her to act in the way that he/she did.

The Commission also proposes to distinguish between those defendants who do not appreciate the risks of non-compliance and, therefore should not be held to be accountable for their incapacitated state, and those who knowingly disregard such risks.¹⁴⁵ Only those defendants who do not appreciate the risks of non-compliance would be eligible to raise the RMC defence. According to the Commission such defendants might include the anosognostic schizophrenic, the Alzheimer's sufferer who forgets to take medication at the correct times, and the person who leaves an aeroplane having forgotten to take hand luggage containing prescribed medication.¹⁴⁶ On the other side of the dividing line, according to the Commission's proposals, lie those defendants who knowingly disregard the risks of non-compliance, or turn to alcohol and dangerous drugs in a bid to self-medicate. The *Majewski* approach would apply to these individuals, providing that non-compliance with medication was a predominant cause of the defendant's incapacity and assuming that it was unreasonable for the defendant to omit to take the medication.¹⁴⁷ As this suggests, the Commission's proposed reform would align non-compliance with medication, where the defendant was aware of the likely consequences, with the defendant who knowingly overdoses in the same circumstances.¹⁴⁸ Although the law distinguishes between active and passive conduct in the context of acts and omissions,¹⁴⁹ the suggestion here is that there is no moral difference between a defendant who actively overdoses and a defendant who culpably fails to follow a prescribed medication regimen.¹⁵⁰

But, it is not clear that such a sharp moral divide distinguishes these defendants from each other. In harnessing prior fault to the task of distinguishing between defendants intoxicated by non-dangerous drugs for different reasons, the Commission is bolstering the legal status of this moral-evaluative notion, and, in effect, advocating for it to play an even more significant role in the criminal law. The assumed absence of fault on the part of defendants raising insanity has been controversial, because it blocks an inquiry into what one commentator has called the defendant's meta-responsibility, his or her responsibility to be responsible, to take prescribed medication.¹⁵¹ In the view of some commentators, the insanity defence improperly shields from conviction those who have culpably caused the conditions of their own defence from conviction in line with the *Majewski* approach. According to Robinson:

¹⁴⁵ Law Com DP, 2013 (n 4) [6.42]–[6.44] and [6.76]–[6.77] respectively.

¹⁴⁶ *ibid* [6.80] and ch 6 n 33.

¹⁴⁷ See for discussion, Harry Kennedy, 'Limits of Psychiatric Evidence in Criminal Courts: Morals and Madness' [2005] *Medico Legal Journal of Ireland* 11, 1–17. Kennedy suggests that a not guilty verdict in such cases can have the anti-therapeutic effect of persuading the insanity acquittee that he does not need psychological treatments to change his attitudes and behaviour or to adhere to treatment in future.' See also *ibid* [6.76]–[6.78].

¹⁴⁸ *ibid* [6.76].

¹⁴⁹ See generally Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2013).

¹⁵⁰ Law Com DP, 2013 (n 4) [6.77]; Edward E Mitchell, 'Culpability for Inducing Mental States: The Insanity Defense of Dr Jekyll' [2004] *J Am Acad Psychiatry & L* 32, 63–69. See also Zachary D Torry and Kenneth J, 'Non-Compliance With Medication and Criminal Responsibility: Is the Insanity Defense Legitimate?' (2012) *J Psychiatry & L* 40, 233.

¹⁵¹ On meta-responsibility, see Edward W Mitchell, *Self-Made Madness: Rethinking Illness and Criminal Responsibility* (Ashgate Publishing 2003).

Every jurisdiction considers an actor's causing his own defense for some defenses, and every jurisdiction thus acknowledges that such causing one's defense can be relevant to the actor's liability. If it is relevant when the actor causes one defense, why is it not equally relevant when he causes another.¹⁵²

This approach mirrors the views of other academics, who argue that a defendant's 'madness' is regarded as being precipitated by his/her 'badness' both when a defendant actively overdoses and when he or she culpably fails to follow a prescribed medication regimen.¹⁵³ Medical advances that have resulted in the ability to control, or at least partially control, certain conditions arguably provide a medical basis for such an approach.¹⁵⁴ Thus, according to some commentators, the 'susceptibility of the condition to control and cure' should be considered when evaluating a defendant's individual responsibility.¹⁵⁵

The points are not all on one side, however, and there are some concerns that may be raised regarding the Commission's proposals distinguishing between defendants intoxicated by non-dangerous drugs for different reasons. Here, we mention four concerns, one normative and three practical. The first concern relates to whether there is a clear moral distinction to be drawn between defendants on the basis of the reasons for their non-compliance with medication. In reality, there may be numerous reasons for non-compliance including, *inter alia*, the stigma attached to certain medications, religious beliefs, paranoia,¹⁵⁶ side effects, and depression.¹⁵⁷ Arguably, the notion that a defendant appreciates the risks associated with taking medication or fails to do so would require that the defendant had adequate notice of the consequences of his/her conduct or that it has happened before. Each of these reasons for non-compliance places a question mark over the extent to which the automatistic condition is genuinely attributable to the defendant's decision to take or omit to take medication in the way that he or she did.¹⁵⁸

There are also three practical concerns with the Law Commission's proposals. First, bearing in mind that neither wholesale nor partial non-compliance with medication is atypical,¹⁵⁹ it is foreseeable that, in a number of cases, it might be difficult for jurors to evaluate whether either individual choice or will, or the medical condition itself, was a predominant factor in the defendant's non-compliance with his or her medication. As a matter of practice, drawing the dividing line between intoxicated defendants will entail an examination of the defendant's reasons for non-compliance,¹⁶⁰ i.e., whether there is an excusatory (for example, anosognosia) or a justificatory (for example, the side-effects outweigh the therapeutic benefits of treatment) basis for the defendant's omission.¹⁶¹ Fact-finders would also be charged with evaluating whether the defendant foresaw that failure to take medication or to comply with a particular treatment regimen would result in a state of unpredictability or aggression.¹⁶² This is an onerous task that would potentially require an assessment of the defendant's antecedent record, medical history, and the documentation provided to the individual regarding the medication regimen.¹⁶³ In some cases recurrence may be used as evidence to suggest an awareness of the likely consequences of non-compliance. Equally, however, a recurrent failure to take medication may be inextricably linked to the condition suffered by the defendant. In this respect, 'even if there is a strong enough

152 Robinson, 'Causing the Conditions of One's Own Defense: A Study In The Limits Of Theory In Criminal Law Doctrine' (n 26) 24. See also Mitchell, *Self-Made Madness: Rethinking Illness and Criminal Responsibility* (ibid); Stephen Yannoulidis, *Mental State Defences in Criminal Law* (Ashgate Publishing 2012); and Herbert Fingarette, 'Diminished Mental Capacity as a Criminal Law Defence' (1974) MLR 264. For other commentators, the insanity label is inappropriately attached to the ordinary person who forgets to take medication as a result of, *inter alia*, work-related stress, relationship breakdown, and/or depression. See William Wilson, Irshadd Ibrahim, Peter Fenwick, and Richard Marks, 'Violence, Sleepwalking, and the Criminal Law: Part 2 the Legal Aspects' [2005] Crim LR 614, 618.

153 See eg Mitchell, *Self-Made Madness: Rethinking Illness and Criminal Responsibility* ibid 37.

154 Torry and Weiss (n 149) 219.

155 Wilson, Ibrahim, Fenwick and Marks (n 151) 617.

156 Law Com DP, 2013 (n 4) [6.80].

157 Torry and Weiss (n 149) 231.

158 Kennedy (n 146) 1-17.

159 SR Mardner, 'Overview of Partial Compliance' (2003) J Clinical Psychiatry 64 (Supplement 16), 3-9.

160 Richard Sherlock, 'Compliance and Responsibility: New Issues for the Insanity Defense' (1983) J Psychiatry & L 12, 483-505.

161 Torry and Weiss (n 149) 231.

162 Sherlock (n 159) 483-505.

163 ibid.

moral argument for a suitably defined doctrine of prior fault it may be empirically difficult to tell whether a given condition is controllable by the defendant'.¹⁶⁴ As noted in Part 2, above, the test articulated in *Wood*¹⁶⁵ distinguishing between those who can resist the impulse to drink and those who cannot requires jurors to engage in mental gymnastics, and similar problems are likely to arise in this context should the Commission's recommendations be adopted. Jurors will be required to engage in similar gymnastics in order to determine whether the defendant was capable of controlling his/her condition via medication and further whether he/she was at fault in failing to comply with his/her prescription.

The second practical concern with the Commission's proposals relates to labelling. Commentators have voiced concern over attaching the RMC label to defendants who do comply with a prescribed medication regimen and/or those who have a valid reason for non-compliance. The labels attached to defences in this context are potentially susceptible to negative association,¹⁶⁶ and accordingly there is a possibility that the novel special verdict will become equally as 'unpalatable' as the current law (which, notoriously, categorises the diabetic as insane).¹⁶⁷ It is hoped, as Ashworth pointed out, that the new defence 'will be abbreviated to NCR or (as the Commission prefers) RMC', rather than something more stigmatic.¹⁶⁸

The third and final practical concern relates to the policy impact of the proposals. In cases where the defendant was aware of the likely consequences of non-compliance, he or she will be convicted of any basic intent offence charged (assuming the remaining elements of the offence are satisfied) and sentenced accordingly. It is unlikely that the imposition of criminal liability in cases of this context will encourage individuals to take their medication, since, as previously noted, the decision not to comply is likely to be a consequence of a variety of factors unrelated to criminal offending. In such cases the defendant may not be thinking about the consequences of his/her failure to take medication and will not foresee the potential harm that may result. In this respect, the efficacy of imposing criminal liability in these cases is questionable.

Conclusion

The contrast in the legal treatment of intoxicated defendants and defendants making pleas of insanity and automatism has been clear since the first decades of the twentieth century.¹⁶⁹ Since then, and in particular, after the high point of the *Majewski* decision, the moral clarity that animates this contrast has been subject to significant challenges. On the one hand, greater recognition of the coincidence of mental illness and drug use has made it harder to neatly demarcate defendants within existing defence categories. On the other hand, the high profile of intoxication from so-called non-dangerous drugs has challenged the idea that all (voluntarily) intoxicated defendants are culpable for their condition in some way, which in turn has made it harder to utilise prior fault to bolster the coherence of and certainty in this area of criminal law. We suggested that these difficulties also infect the Law Commission's proposals to reform the law in this area, meaning that they may not enhance the coherency, or increase certainty, in this part of the criminal law.

¹⁶⁴ We are grateful to Andrew Ashworth for this point.

¹⁶⁵ *Wood* (n 71).

¹⁶⁶ At Northumbria University's 'Mental Disorder and Criminal Justice' conference, Dr John Stanton-Ife commented that stigma is likely to attach to the defence irrespective of the form it takes. Dr John Stanton-Ife, 'Philosophical Foundations of the Insanity Defence' (2013) <http://www.numyspace.co.uk/~unn_mlif1/school_of_law/mdejc/abstracts.html> accessed 14 November 2013.

¹⁶⁷ Law Com DP, 2013 (n 4) [1.46], [6.47], [6.54]. See also Adam Jackson, Nicola Wake and Natalie Wortley, 'Insanity and Automatism: A Response to the Law Commission: Part 1' (2012) *Crim L & Justice Weekly*, 176, 50, 732.

¹⁶⁸ Ashworth, 'Insanity and Automatism: A Discussion Paper' (n 110).

¹⁶⁹ See *Beard* (n 21).

Publication (iv)

‘Potentiate Liability and Preventing Fault Attribution; The Intoxicated "Offender" and Anglo-American *Dépeçage* Standardisations’ (2014) *The John Marshall Law Review* 47(1) 57-113.

Spring 2013

Potentiate Liability and Preventing Fault Attribution: The Intoxicated “Offender” And Anglo-American Dépeçage Standardisations, 47 J. Marshall L. Rev. 57 (2013)

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Recommended Citation

Alan Reed & Nicola Wake, Potentiate Liability and Preventing Fault Attribution: The Intoxicated “Offender” And Anglo-American Dépeçage Standardisations, 47 J. Marshall L. Rev. 57 (2013)

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POTENTIATE LIABILITY AND PREVENING FAULT ATTRIBUTION: THE INTOXICATED “OFFENDER” AND ANGLO-AMERICAN DÉPECAGE STANDARDISATIONS

ALAN REED AND NICOLA WAKE

I do not suppose that, when a drunkard reasons with himself upon his vice, he is once out of five hundred times affected by the dangers that he runs through his brutish, physical insensibility; neither had I, long as I had considered my position, made enough allowance for the complete moral insensibility and insensate readiness to evil, which were the leading characters of Edward Hyde.¹

I. INTRODUCTION

The intoxicated “offender” presents a dilemmatic Sophie’s Choice² in terms of legitimate inculpatory principles of criminal law, but set against and conflicting with the availability of any exculpatory defences. The imbibing of drink or drugs may have released a character transformation and physiological reaction that creates a new individuated personification of wrong-doing, and an actor engaged in a penumbra of harmful risk-taking.³ It engrafts issues related to moral culpability and human frailty in viewing substance abuse disorders as potentially exculpatory, or alternatively constructing imputed liability centred on criminal responsibility in becoming intoxicated at first instance. The sympathy that may exist to the alcoholic, and the compassionate wish to extend the hands of support, is tempered by concern over the innocent victim(s) of their actions, and the need for societal

1. April 2014: ISSN: 0270-854X . Alan Reed (Professor of Criminal and Private International Law, and Associate Dean for Research and Innovation in the Faculty of Business and Law at Northumbria University) and Nicola Wake (Senior Lecturer in Law, Northumbria University). Contact:[alan.reed@northumbria.ac.uk and nicola.wake@northumbria.ac.uk]. 1. ROBERT LOUIS STEVENSON, *STRANGE CASE OF DR JEKYLL AND MR HYDE AND OTHER TALES* 60 (Oxford Univ. Press 2006).

2. WILLIAM STYRON, *SOPHIE’S CHOICE* (Vintage Publ’g 2004).

3. See generally Ronnie Mackay, *The Taint of Intoxication*, 13 INT’L J.L. & PSYCHIATRY 37 (1990); Tim Quigley, *Reform of the Intoxication Defence*, 33 MCGILL L.J. 1 (1987); VICTOR TADROS, *CRIMINAL RESPONSIBILITY* (Oxford Univ. Press 2005).

protection and deterrence of egregious behaviour.⁴ These tensions to which we refer are reflected in substantive policy choices, in particular the distinction made between liability for voluntary and involuntary intoxication. The offence-fault definitional nexus that pervades the compartmentalised perspectives attached to intoxication are more subtle than provided in current substantive law precepts.⁵

It is our view that Anglo-American standardisations applied to the intoxicated offender are in urgent need of reform. The extant position is deconstructed in Part I of this article and it is propounded that it is inappropriate to focus on cognitive states of imputed “recklessness”, and thereby to amorphously construct a conviction predicated on a legalised fiction.⁶ The juxtaposition effected stands in contradistinction to primordial concerns attached to fair labelling and doctrinal coherence that ought to be determinative. A new optimal model is adduced herein on a principled basis that engages a re-examination of potentiate liability linked to actual criminal responsibility across the spectra of intoxication imputations. It is important to establish a moral legitimacy to inculcating any intoxicated offender who commits a crime without the prevalence of the designated offence-specific *mens rea* element at the time of commission of the unlawful act. It is provided by our new standardisation of “potentiate liability” for preventing fault, and inculcated policy rationalisations are derived from principled consideration of individual responsibility. Fault attached to lack of care as a moral agent should be determinative of inculcation, and not fictionalised cognitive states of imputed *mens rea*.⁷

In Part II, we examine potentiate liability and preventing fault in Anglo-American standardisations of intoxicated offending. Our theoretical construct is contextualised within the parameters of four important situations attached to liability: Dutch Courage and drinking to commit specific offences; pathological intoxication and imbibing of “therapeutic” substances; involuntary intoxication (outwith alcoholism); and basic intent offences *simpliciter*. *Dépeçage* principles are advocated in this context, utilising the ability to “pick and choose” different laws to appropriately govern specific issues of intoxication.⁸ It is the overarching concept of

4. See generally David McCord, *The English and American History of Voluntary Intoxication to Negate Mens Rea*, 11 J. OF LEGAL HIST. 372 (1990) (Eng.).

5. See JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* (Cambridge Univ. Press 1988).

6. See generally Eric Colvin, *A Theory of the Intoxication Defence*, 59 CANADIAN BAR REV. 750 (1981).

7. See generally Andrew Ashworth, *Reason, Logic and Criminal Liability*, 91 L.Q.R. 102 (1975) (Eng.).

8. See ALAN REED, *ANGLO-AMERICAN PERSPECTIVES ON PRIVATE*

potentiate liability that provides a moral credibility and legitimacy to our re-categorisations, and a fairer edifice of offence individuation. The demands of fair labelling require a more policy-oriented and rule-selective methodology than is currently operative, and a greater appreciation of preventing fault attached to separately classified malfeasance.

In Part III of this article, we consider the situation where the defendant suffers from alcohol dependence syndrome. A major aspect of the condition is an inability to control alcohol consumption, but numerous studies demonstrate that alcoholics often and volitionally refrain from alcohol intake over a continuum, and different gradations of intoxication apply than in stereotypical terminology.⁹ The ubiquitous nature of the syndrome represents “a challenge for a construction of the intoxicated offender as abnormal,”¹⁰ and as a result, it is not uncommon for the chronic alcoholic’s condition to be considered “part vice, part disease.”¹¹ The idea that an alcoholic may retain the capacity to choose whether to consume intoxicants has resulted in a refusal to accept the syndrome as a bespoke medical condition for exculpatory purposes within U.S. jurisdictions. Alcoholism is unfortunately viewed in black and white terms, which are irreconcilable with the array of categorisations and gradations of substance use disorder recognised in medical and behavioural sciences.¹² Alcohol consumption on the part of the chronic alcoholic is regarded as intentional,¹³ and accordingly the rules pertaining

INTERNATIONAL LAW 25 n.2 (Edwin Mellin Press 2003) (explaining where the nature of *dépeçage* principles are examined in the different context of Anglo-American private international law standardisations).

9. *See generally* HERBERT FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE* (Univ. of California Press 1988); Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413 (1975); Herbert Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the “Disease Concept of Alcoholism”*, 83 HARV. L. REV. 793 (1970).

10. ARLIE LOUGHNAN, *MANIFEST MADNESS: MENTAL INCAPACITY IN THE CRIMINAL LAW* 199 (Oxford Univ. Press 2012).

11. MARIANA VALVERDE, *DISEASES OF THE WILL: ALCOHOLISM AND THE DILEMMAS OF FREEDOM* 51 (Cambridge Univ. Press 1998). *See also* Stephen Morse, *A Good Enough Reason: Addiction, Agency and Criminal Responsibility*, 56(5) INQUIRY 490-518 (Taylor & Francis (2013)).

12. *See, e.g.*, WORLD HEALTH ORG., *MANAGEMENT OF SUBSTANCE ABUSE* (Feb. 14, 2013), http://www.who.int/substance_abuse/terminology/acute_intox/en/index.html (providing that “[i]ntoxication is highly dependent on the type and dose of drug and is influenced by an individual’s level of tolerance and other factors,” and the “behavioural expression of a given level of intoxication is strongly influenced by cultural and personal expectations about the effects of the drug”).

13. FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE*, *supra* note 9, at 34-39; Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 426-33; Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the “Disease Concept of Alcoholism”*, *supra*

to voluntary intoxication apply in terms of attributing fault in this context.¹⁴ In contrast, a more nuanced and empathetically valid approach is adopted in England, which recognises that the disorder may affect the defendant's decision-making powers, but it does not completely abrogate or displace free will.¹⁵ The result has been to accept that chronic alcoholism may have an impact on the defendant's culpability, but only to a limited extent, and this is reflected through the availability of the concessionary diminished responsibility defence.¹⁶ It is suggested herein that a revised approach to alcohol dependence syndrome ought to be adopted with a shift in emphasis from voluntary / involuntariness to a wider consideration of preventing culpability and responsibility.

In Part IV, we contend that the bifurcatory categorisation of the alcohol dependent's conduct as voluntary or involuntary has led the U.S. courts to standardise chronic alcoholics according to normative societal expectations of the reasonable sober person: an objectification that is inapt. A review of the *Model Penal Code* highlights that the chronic alcoholic's condition is viewed *con una prisma* as part of involuntary act doctrine, rather than involuntary intoxication per se, and alcohol dependence is only regarded as potentially exempting where the defendant's free will has been totally abrogated. This deontological reasoning has resulted in a refusal to accept alcohol dependence syndrome as a mental disease or defect for the purposes of exculpation;¹⁷ an overly restrictive approach which is erroneously supported by a number of academicians who claim that alcoholism is simply a way of life.¹⁸ This view is counter-intuitive to psychiatric accounts of the condition,¹⁹ and it is our contention that distinguishing voluntary

note 9, at 800-808; Morse, *supra* note 11.

14. See *infra* Parts I and II; see also ELAINE CASSEL & DOUGLAS A. BERNSTEIN, CRIMINAL BEHAVIOR 178 (Lawrence Erlbaum Associates 2007).

15. See Alan Reed & Nicola Wake, *Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed, and Something New*, in LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 183-206 (Alan Reed & Michael Bohlander eds., Ashgate Publ'g 2011).

16. *Id.*

17. See, e.g., *Heard v. United States*, 348 F.2d 43, 44 (D.C. Cir. 1965) (holding that "a mere showing of narcotics addiction, without more, does not constitute 'some evidence' of mental disease or 'insanity' so as to raise the issue of criminal responsibility"); see also *Doughty v. Beto*, 396 F.2d 128, 130 (5th Cir. 1968) (holding that "chronic alcoholism, standing alone, raised no defense" to the charged crime).

18. FINGARETTE HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE, *supra* note 9, at 100; Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 443; Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism"*, *supra* note 9, at 801-02; Morse, *supra* note 11.

19. LAW COMMISSION, INSANITY AND AUTOMATISM SUPPLEMENTARY MATERIAL TO THE SCOPING PAPER (Law Com SM/SP, 2012). LAW COMMISSION, DISCUSSION PAPER, INSANITY AND AUTOMATISM (Law Com DP, 2013).

from involuntary intoxication on the part of the alcohol dependent defendant involves a blurring of individuated agency. In practical terms, whether the defendant could not or would not resist his impulse is “probably no sharper than between twilight and dusk,”²⁰ and in this respect, a more delineated approach is required which recognises that alcohol dependence syndrome may affect the defendant’s level of criminal responsibility, and potentiate liability in terms of preventing fault attribution.

In the final Part of our article, we suggest that the recently reformulated diminished responsibility plea in English law, within the ambit of the Coroners and Justice Act 2009, and as interpreted by the Court of Appeal, provides an appropriate template for beneficial harmonisation in terms of accounting for the chronic alcoholic’s condition in order to appropriately attribute fault in murder cases. The revised plea can be aligned with medical simulacrums of alcohol dependence syndrome, and is representative of a more realistic view of human behaviour: in essence, “the distinction between the impulse that was irresistible and the impulse not resisted” should no longer operate determinately.²¹

II. INTOXICATION AND CRIMINAL LIABILITY: THE REQUIREMENTS OF FAIR LABELLING AND DOCTRINAL COHERENCE

The current metaphysics of Anglo-American criminal law reveals an uneasy equipoise in assessment of the effect of voluntary intoxication on criminal liability.²² The juxtaposition

20. AMERICAN PSYCHIATRIC ASS’N, STATEMENT ON THE INSANITY DEFENSE 11 (1982).

21. See Richard Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983) (arguing that the insanity defence should be narrowed to exclude questions of “whether the defendant had the capacity to ‘control’ himself or whether he could have resisted the criminal impulse”).

22. See generally Douglas Husak, *Intoxication and Culpability*, 6 CRIM. L. & PHIL. 363 (2012) (rejecting the common conceptualisation of the effect of intoxication on criminal liability as Anglo-American jurisdictions analyse this effect in many different ways); Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545 (2012) (analysing the “Intoxication Recklessness Principle” and when most justified to employ its use); Rebecca Williams, *Voluntary Intoxication – A Lost Cause?*, 129 L.Q.R. 264 (2012) (Eng.) (examining the disadvantages of applying “the Majewski” common law approach as the compromising rule for dealing with voluntary intoxication and other possible alternatives); Susan Dimock, *The Responsibility of Intoxicated Offenders*, 43 J. VALUE INQUIRY 339 (2009) (providing an overview of the different categories of intoxication defences and then critiquing the intoxication rules); Susan Dimock, *What are Intoxicated Offenders Responsible for? The “Intoxication Defense” Re-Examined*, 5 CRIM. L. & PHIL. 1 (2011) (presenting a brief history of the common law of criminal liability as it relates to intoxicated offenders in Canada and objecting to those rules as applied); Kimberly Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597 (2001) (exploring the placement of opaque recklessness, as it often falls outside

may be constitutively identified as “Janus-faced”²³ in that bifurcatory conceptualisations of intoxication as an inculpatory or exculpatory element are prevalent.²⁴ Intoxication is not an excuse per se, as in the case of cognate defences such as loss of control²⁵ or duress; nor does it align with justificatory elements of self-defence or necessity.²⁶ The attributional significance of intoxication relates to the individual actor’s mental state, and from a subjectivism perspective it ought to primordially attach to a potential denial of fault appurtenant to the time-specificity of commission of the relevant harm.²⁷ In simple terms of coincidental liability where the requisite fault is lacking, and the intoxicated “offender” has not formed the offence-fault definitional nexus, exculpation presumptively is implicated.²⁸ The “inexorable logic” is that where

the scope of culpable recklessness, in criminal law); and Holly Smith, *Non-Tracing Cases of Culpable Ignorance*, 5 CRIM. L. & PHIL. 97 (2011) (arguing that attributionist views on non-tracing cases of culpable ignorance should be seriously considered and culpability should be extended to non-voluntary responses).

23. LOUGHNAN, *supra* note 10, at 63, 279, and 351.

24. See generally ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 196-99 (Oxford Univ. Press 2009); WILLIAM WILSON, CRIMINAL LAW: DOCTRINE AND THEORY 221-25 (Longman Law Series 2011).

25. The English provocation defence was abolished by the Coroners and Justice Act, 2009, section 56. Coroners and Justice Act, 2009, c. 25, pt. 2, c. 1, § 56 (U.K.). Section 54(1)(a) and (7) of the 2009 Act reduce a conviction of murder to one of voluntary manslaughter where the defendant kills subject to a loss of control; the loss of control must be attributable to at least one of two qualifying triggers. *Id.* § 54(1)(a) & 54(7). “The first qualifying trigger is satisfied by a thing said or things done or said (or both) which constituted circumstances of an extremely grave character, and caused D to have a justifiable sense of being seriously wronged (the ‘seriously wronged’ trigger). The second qualifying trigger requires D to fear serious violence from V against D or another identified person (the ‘fear’ trigger).” Nicola Wake, *Loss of Control Beyond Sexual Infidelity*, 76 J. CRIM. L. 193, 193 (2012). See also Coroners and Justice Act, § 55(3) (applying subsection of “qualifying trigger” when “D’s loss of self-control was attributable to D’s fear of serious violence from V against D or another identified person”); *id.* § 55(4)(a)–(b) (defining loss of self-control when attributable to “a thing or things done or said (or both)”; *id.* § 55(6)(c) (requiring that the “thing done or said constituted sexual infidelity is to be disregarded”); R v. Clinton, Parker, & Evans, [2012] EWCA (Crim) 2 (Eng.) (holding by an appellate court most recently on the new defence); R v. Asmelash, [2013] EWCA (Crim) 157, [25] (Eng.) (finding “that the loss of control defence must be approached without reference to the defendant’s voluntary intoxication” in applying the statutory provisions about “loss of control”).

26. See PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 14–15, 68–71 (Oxford Univ. Press 1997) (asserting a five-part categorisation that encompasses justifications, excuses, absent element defences (e.g. alibi), non-exculpatory defences (e.g. diplomatic immunity), and offence modification defences (e.g. renunciation in attempts or conspiracy)).

27. See ANDREW SIMESTER & BOB SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 628–30 (Hart Publishing 2007).

28. John Child, *Drink, Drugs And Law Reform: A Review Of The Law Commission Report No. 314*, CRIM. L.R. 2009, 7, 488-501 (Eng.). See generally

the *mens rea* is lacking within offence-specificity inferentially affected through intoxication or any other destabilisation, then criminal liability is precluded on accepted doctrine.²⁹

The corollary to this “strictly logical”³⁰ and mechanistic adoption of subjective *mens rea* for the crime charged posits an alternative policy-driven conceptualisation of intoxication as inculpatory *ex ante*, and morally, the harmful consumption itself is viewed as blameworthy.³¹ The imbibing of intoxicants, either alcohol or drug-taking, lowers the levels of cognitive perception

Chester Mitchell, *The Intoxicated Offender—Refuting the Legal and Medical Myths*, 11 INT’L J.L. & PSYCHIATRY 77 (1988) (comparing legal assumptions about intoxication with scientific findings to demonstrate the discrepancies between the law and empirical scientific evidence, and how medical testimony further complicates rectifying this issue); Andrew Paizes, *Intoxication Through the Looking Glass*, 105 S. AFRICAN L.J. 776 (1988) (analysing South Africa’s recognition of voluntary intoxication as a possible complete defence and the effect this holding had on the “specific-intent rule” at the time).

29. See generally LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY ¶¶ 1.49-1.55 (Law Com No 314, 2009). See generally Jeremy Horder, *A Critique of the Correspondence Principle in Criminal Law*, CRIM. L.R., Oct. 1995, at 759 (U.K.) (analysing the “correspondence principle” between the *actus reus* and *mens rea* relationship and its limited application); Stephen Gough, *Intoxication and Criminal Liability: The Law Commission’s Proposed Reforms*, 112 L.Q.R. 335 (1996) (Eng.) (offering one interpretation of current intoxication rules while bringing to light three particular weaknesses of the Law Commission’s reform of these rules); Ewan Paton, *Reformulating the Intoxication Rules: The Law Commission’s Report*, CRIM. L.R., May 1995, at 382 (U.K.) (analysing the legislative and legal movement towards re-implementing recklessness in voluntary intoxication considerations). There is a basic link between the situation where D knowingly takes a risk that intoxication may cause him to commit the *actus reus* of an offence and recklessness in criminal law. Child, *supra* note 28, at 490–91. This link is not present where the offence requires evidence of knowledge or intention. *Id.* at 491. The courts admit to failing to have developed a universal “logical test” in this area. *R v. Heard*, [2007] EWCA (Crim) 125, [32], [2008] Q.B. 43, [55] (Eng.). See also *New Jersey v. Stasio*, 396 A.2d 1129, 1133-34 (N.J. 1979) (creating a distinction between specific and general intent crimes allows intoxication defences to inconsistently excuse crimes).

“It has of course been long understood that the consumption of alcohol, or indeed the taking of drugs, may diminish the ability of an individual to control or restrain himself, so that, in drink, or affected by drugs, he may behave in a way in which he would not have behaved when sober or drug free. Although it may sometimes impact on the question whether the constituent elements of a crime, in particular in relation to the required intent, have been proved, self-induced intoxication does not provide a defence to a criminal charge.”

Asmelash, EWCA (Crim) at [22].

30. Child, *supra* note 28, at 488.

31. Important herein is societal expectations regarding legitimate notions of justice. See, e.g., LORD C. RADCLIFFE, *THE LAW AND ITS COMPASS* 63–64 (Faber and Faber 1960) (stating that “[e]very system of jurisprudence needs . . . a constant preoccupation with the task of relating its rules and principles to the fundamental moral assumptions of the society to which it belongs”).

and physical restraint, and our courts are overly burdened with intoxicated offenders, especially in the context of violence and sexual crimes.³² The implicated policy consideration, in “absolutist” terms,³³ is that for reasons of deterrence and social protection it is essential to convict outwith definitional offence coincidence of liability: “It is common knowledge that those who take alcohol to excess or certain sorts of drugs may become aggressive or do unpredictable things.”³⁴

This construction of intoxication “imputes” liability for prior fault in becoming intoxicated in the first instance, and engrains an evaluative moral culpability within the parameters of the offence-responsibility nexus.³⁵ The policy tension created in Anglo-American standardisation lies in a legal hinterland between the scylla and the charybdis, viewing intoxication as either “exculpatory abnormality”³⁶ or “morally culpable conduct.”³⁷ The conundrum that is presented is how to square the circle between legitimate subjectivism of individual offender treatment, coalescing and contradicting with societal protection and moral responsibility.³⁸ Further grist to the mill is added by realisation that all intoxicated offenders are not the same, that different gradations and thresholds apply to voluntary and involuntary intoxication, and concatenations of responsibility are demarcated

32. See LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY, *supra* note 29, at ¶ 1.55 (stating that “Given the culpability associated with knowingly and voluntarily becoming intoxicated, and the associated increase in the known risk of aggressive behaviour, there is a compelling argument for imposing criminal liability to the extent reflected by that culpability. The imposition of such criminal liability is morally justifiable in principle, and warranted by the desirability of ensuring public safety and deterring harmful conduct.”).

33. *Id.* at ¶ 1.57.

34. *R v. Bailey*, [1983] 1 W.L.R. 760 (A.C.) (Eng.).

35. Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985) [hereinafter *Causing the Conditions*].

“[T]he imputation of a culpable state of mind when none truly exists seems particularly strange for the *Model Penal Code* drafters. These drafters actively opposed placing the burden of persuasion on the defendant for most defences. Yet as to intoxication, the drafters permit what is in essence an irrebutable presumption as to the existence of an element of the offense.”

Id. at 17. Equivalent culpability may presumptively apply in that a defendant who voluntarily becomes intoxicated is equated with the reckless actor. Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 660-63 (1984).

36. LOUGHNAN, *supra* note 10, at 174, 182, 185-86, 200.

37. *Id.* at 174, 198-200.

38. “By allowing himself to get drunk, and thereby putting himself in such a condition as to be no longer amenable to the law’s commands, a man shows such [disregard] as amounts to for the purpose of all ordinary crimes . . .” Douglas A. Stroud, *Constructive Murder and Drunkenness*, 36 L.Q.R. 268, 273 (1920) (Eng.).

in terms of moral agency or otherwise.³⁹

Our arguments suggest that a new *via media* is needed to properly reflect fair labelling in these terms, and the template presented looks to potentiate liability linked to actual criminal responsibility across the spectra of intoxication imputations.⁴⁰ It is suggested that this modelling provides a cathartic panacea and much needed substantive transparency in an arena that has been correctly described by the English Law Commission as, “ambiguous, misleading and confusing.”⁴¹ The quintessential inquiry as to “blameworthiness” in relation to any intoxicated offender should focus upon lack of individuated responsibility in terms of preventing fault and attributional liability. It is inapt to focus instead on cognitive states of imputed recklessness and thereby to amorphously construct a conviction on a fundamental predicate that stands in contradistinction to correspondence principles and substantive coherence.⁴²

A review of extant law reveals significant Anglo-American commonalities in creating a bifurcatory schematic template to voluntary intoxication. It is viewed through a schizophrenic legal prism of inculcation and exculpation, akin in characterisation to the allegorical literary creations of Dr. Jekyll and Mr. Hyde. The topographical map has designated all types of crime within the penumbra of two discrete categorisations. In this iteration stands offences transmogrified as specific intent (intention, knowledge or purpose fault ingredients) to which subjective principles of *mens rea* pertain, aligned together with offence-specific definitional elements as a pathway to liability.⁴³ Intoxication is presumptively

39. See generally Arlie Loughnan, *Mental Incapacity Doctrines in Criminal Law*, 15 NEW CRIM. L. REV. 1 (2012) (Eng.) (discussing mental incapacity in its application in deciding exculpation for crimes within the English and Welsh legal system).

40. See Robinson, *Causing the Conditions*, *supra* note 36, at 59 (contending in a different context that, “the defendant would escape or reduce his liability by showing that he was not reckless or negligent as to the offense both at the time he became intoxicated and at the time of the alleged offense. The state could increase the defendant’s liability by showing that when he became intoxicated, he was knowing or purposeful as to the offense”).

41. LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY, *supra* note 29, at ¶ 1.28; LOUGHNAN, *supra* note 10, at 278 (stating that “The rules about how intoxication affects criminal liability are rather notorious for their complexity and technicality.”); Derrick Augustus Carter, *Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse*, 64 MO. L. REV. 384, 411 (1999) (noting that jurists and legal commenters find the specific / basic intent delineation “illogical, inconsistent and inequitable”).

42. See generally Andrew Simester, *Intoxication Is Never A Defence*, 2009 CRIM. L.R. 3 (2013) (U.K.) (addressing how intoxication should not be a criminal defence); see also LOUGHNAN, *supra* note 10, at 279 (noting that in this regard, intoxication is “conceptualized as a ‘doctrine of imputation’”) (quoting ROBINSON, *supra* note 26, at 67).

43. Lawrence P. Tiffany, *The Drunk, The Insane, And the Criminal Courts: Deciding What To Make Of Self-Induced Insanity*, 69 WASH. U. L. REV. 221,

relevant not as a defence per se, but simply as part of the overall evidence to rebut the inference of fault that would otherwise be adduced. This doctrine of specific intent is transformational in that it “collapses a question of fact (did the defendant form the requisite intent?) into the question of capacity (was the defendant capable of forming the requisite intent?).”⁴⁴ A physiological linkage applies between the intoxication and the specific intent crime fault element. Intoxication may be adduced as affecting the individual’s powers of ratiocination and ability to form compartmentalised intentions, and the jurors assess this as part of their incanted Mr. Hyde character personification. This generalised evidential assessment applies to jury evaluation as part of normative “folk knowledge”⁴⁵ on the transitional changes to personality affected by drugs or alcohol.⁴⁶ It is predicated on personal experience and evaluative assessments on individual culpable intoxication. This model, utilising fact finders as a barometer of normative fault attached to any intoxicated offender, has been adopted in other jurisdictions.⁴⁷ It has been broadly legitimised to all types of offences in Victoria in Australia and New Zealand, and not simply to those categorised as specific intent.⁴⁸ Views, however, have been

226-27 (1991); see generally Megan Paulk Ingle, *Law On The Rocks: The Intoxication Defenses Are Being Eighty-Sixed*, 55 VAND. L. REV. 607 (2002) (addressing *mens rea* and intoxication); Lawrence P. Tiffany, *Pathological Intoxication And The Model Penal Code*, 69 NEB. L. REV. 763 (1990) (addressing how intoxication relates to intent in the *Model Penal Code*).

44. LOUGHNAN, *supra* note 10, at 121.

45. *Id.* at 47.

46. WILSON, *supra* note 24, at 231. Wilson cogently asserts:

[s]ince it is common knowledge that intoxication disposes people to commit crime, voluntary intoxication supplies the fault element which intention and recklessness normally express. It is not necessarily contrary to principle, therefore, to hold a person responsible for an unforeseen harm if both the harm and the lack of foresight were occasioned by voluntary intoxication (a mind at fault). A more elegant solution would be to remove entirely the need to reply on such constructive recklessness.

Id.

47. See *R v Keogh* (Vic) [1964] VR 400 (Austl.) (stating it is a jury’s job to determine if the defendant has the requisite mental state required for the crime, or if intoxication has precluded the forming of guilty intent); *R v O’Connor* [1980] 29 ALR 449 (Austl.) (Gibbs, J., Mason, J., & Wilson, J., dissenting) (determining that evidence of self-induced intoxication is relevant if it raises a reasonable doubt as to whether an individual actor acted intentionally or voluntarily when committing the relevant act). This was a decision in Australia by a bare minority of the High Court. *Id.* In essence, the High Court minority refused any distinction between “specific” and “basic intent” offences holding the distinction to be unsupportable, and hence self-induced intoxication could be relied upon to negative the fault element of any offence. *Id.* Barwick C.J., Stephen J., Murphy J. and Aicken J. were in the majority. *Id.* See also *R v Kamipeli* [1975] 2 NZLR 610 (CA) (refuting any bifurcatory classification divide). This is the key authority in New Zealand. *Id.*

48. See Gough, *supra* note 30, at 342-43 (observing that certain case law

intemperately and splenetically expressed, as to the success or otherwise of such a template:

[T]he Australian approach . . . relies on juries to make covert moral assessments and not simply the factual assessment that the law requires.⁴⁹

In contradistinction, and for fundamental reconsideration herein, stands offences designated as basic intent (recklessness or negligence).⁵⁰ In this pantheon, intoxication will not negative an inference of fault, but rather liability is constructed around the morally culpable conduct of the defendant in becoming intoxicated prior to the commission of the *actus reus* of the specified offence. The paradigm is that it is the state of intoxication that constitutes the culpability required for the offence.⁵¹ In this regard, however, it is important that we can justify the reasons for temporally defining the offence elements and harm-prevention nexus that pervades criminal law.⁵² For basic intent crimes a schism applies between T1 (the culpable intoxicating interlude) and T2 (external elements of offence commission). The *actus reus* elements for basic intent crimes at T2, without any subjective *mens rea* attachment, is conjoined together with the T1 state of intoxication to create

makes no distinction between specific intent and general intent). *R v. O'Connor* (1980) 146 CLR 64, 82 (Austl.) (Barwick C.J.: “[T]he distinction between basic and specific intent is unhelpful as a basis for distinction or crimes by reference to *mens rea*.”).

49. ASHWORTH, *supra* note 24, at 201; *see also* Gerald Orchard, *The Law Commission Paper on Intoxication and Criminal Liability: Part 2: Surviving Without Majewski – A View From Down Under*, CRIM. L.R., Jun. 1993, at 426, 429 (Eng.) (stating that the courts will take the decision out of the hands of the jury if there is not enough evidence to reasonably conclude that there is an absence of intent).

50. *See* SIMESTER & SULLIVAN, *supra* note 27, at 633-36; *see generally* Ingle, *supra* note 43 (discussing intoxication and the *mens rea* of recklessness).

51. *See* LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY, *supra* note 29, at ¶ 2.19 (stating “D ought to be aware that by becoming voluntarily intoxicated, D increases the risk that he or she will cause harm to other persons or damage to property. That is enough to justify liability for the range of violent and sexual offences classified as offences of ‘basic intent’”); *see generally* James Chalmers, *Surviving Without Majewski?*, CRIM. L.R., Mar. 2001, at 258 (Eng.) (addressing how voluntary intoxication can provide the necessary intent element to a crime); Alan Gold, *An Untrimmed “Beard”: The Law of Intoxication As A Defence To A Criminal Charge*, 19 CRIM. L.Q. 34 (1976) (Eng.) (discussing how the intent requirement cannot be rebutted with evidence of voluntary intoxication).

52. *See generally* Stephen Schulhofer, *Harm and Punishment: A Critique of Emphasis On The Results of Conduct In The Criminal Law*, 122 U. PA. L. REV. 1497 (1974) (addressing the results of criminal punishment); Paul R. Hoeber, *The Abandonment Defense To Criminal Attempt And Other Problems Of Temporal Individuation*, 74 CALIF. L. REV. 377 (1986) (discussing temporal aspects to criminal offenses, such as attempt).

“inculpation”.⁵³ The rationale for “offender” liability, despite the lack of coincidence in offence-definition nexus, was provided by a unanimous judgment of the House of Lords in *Majewski*.⁵⁴ It is predicated upon a “fiction”⁵⁵ that transmutes the common parlance of “recklessness” as an every-day term embracing an individual heedless of risk or demonstrating a lack of consideration to others, into a prescriptive and substantive definition of subjective recklessness as an essential fault element.⁵⁶ This metamorphosis is replicated in the U.S. under the *Model Penal Code* definition, and in some common law jurisdictions.⁵⁷

In *Majewski*, following an incident in a public house, the defendant was convicted of three offences of assault occasioning actual bodily harm and three offences of assaulting a police officer in the execution of his duty.⁵⁸ Prior to the alleged assaults Majewski had consumed large quantities of drugs and alcohol, as a result of which he said that he had been totally unaware of what he was doing, and thus was not subjectively reckless in accordance with the offence-definition element. Their Lordships, nonetheless, constructively imputed liability for policy reasons attached to basic intent offences of violence or disorder.⁵⁹ If the accused is indeed so drunk that he does not form the *mens rea* of a basic intent crime, the prosecution will be unable to establish the fault element for culpability. In such circumstances the prosecution should, in accordance with *Majewski*, be entitled to prove that the accused did not form the *mens rea* for the offence, but that had he not been drunk he would have done so.⁶⁰ The external elements of T2 are conjoined with T1 (voluntary consumption of drink or drugs), and liability can be established even though the individual actor did not appreciate the relevant risks, so long as it can be proved that the defendant (personified as Dr Jekyll) would have appreciated

53. Simester, *supra* note 42, at 4-5.

54. DPP v Majewski, [1977] A.C. 443 (H.L.) 474-75; see Alan Dashwood, *Logic And The Lords in Majewski* [1977] CRIM. L.R. 532 (1977) (U.K.).

55. WILSON, *supra* note 24, at 231.

56. ORMEROD ET AL, SMITH AND HOGAN'S CRIMINAL LAW 314-16 (Oxford Univ. Press, 13th ed., 2011).

57. MODEL PENAL CODE § 2.08(2). This code provides that self-induced intoxication is of no relevance to offences including recklessness as an element. *Id.* A number of states, including Montana, have a wider prohibition on the admissibility of evidence of voluntary intoxication, excluding such evidence even in relation to fault requirements of intention or knowledge; and in *Montana v Egelhoff*, a plurality of the Supreme Court determined an evidentiary rule excluding such evidence was not unconstitutional. 518 U.S. 37 (1996).

58. *Majewski*, [1977] A.C. at 498. See generally Simon Gardner, *The Importance Of Majewski*, 14 O.J.L.S. 279 (1994) (discussing the *Majewski* case).

59. *Majewski*, [1977] A.C. at 474-75.

60. *Id.*

that risk if he or she had been sober.⁶¹ This construct of intoxication portrays it as an inculpatory mechanism to assist prosecutors, distilled from prior fault, and to safeguard societal interests so adduced by Lord Elwyn-Jones in *Majewski*:

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent?⁶²

The constructive nature of liability attached to prior fault in becoming intoxicated, in essence antecedent *mens rea* at T1, is also reflected in section 2.08(2) of the American *Model Penal Code* which provides that self-induced intoxication is of no relevance to offences involving recklessness as an element: “When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.”⁶³ A preponderance of states in the U.S. have accepted a distinction between specific / general intent (basic) classifications.⁶⁴ If the only reason why an individual actor was reckless in their actions correlates to T1, and the defendant was too intoxicated to realise the risk they were taking, then imputed recklessness transpires. The drafters of the *Model Penal Code* highlighted the risk-creation justification that governs intoxicated constructive liability, and is pervasive today at common law:

[T]here is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings

61. Simester, *supra* note 42, at 4-5. The author asserts:

The criminal law does contain an intoxication doctrine, but it is a doctrine of inculcation not exculpation. Whether the intoxication doctrine is evidential or substantive in character is uncertain, and I shall say something about that question below. Either way, however, it operates for the benefit of the prosecution, not the defence. Wherever the doctrine applies, its function—its sole function—is to treat the defendant as if he acted with *mens rea* when, in fact, he did not.

Id. at 4.

62. *Majewski*, [1977] A.C. at 474-75. “[A] person who kills another should not be “privileged” if he [sic] was drunk when he acted, and actually deserves double punishment, because he has doubly offended.” *Reniger v Feogossa* (1551) 75 ER 1, 31 cited in *DPP v Beard*, [1920] 1 A.C. 479, 494.

63. See generally Tiffany, *The Drunk, The Insane, and the Criminal Courts: Deciding What to Make of Self-Induced Insanity*, *supra* note 43, at 226-27.

64. *Id.* Some States regard intoxication evidence as irrelevant in terms of assessing culpability and reports show that very few claims of involuntary intoxication are accepted. Ingle, *supra* note 43, at 608; see also JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 539 (Bobbs-Merrill 1960). See generally JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (Matthew Bender 1995).

to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.⁶⁵

This fictionalised personification of criminal recklessness may be pervasive, but it is important to readdress the moral legitimacy of this ascription and the flawed assumptions that underpin the construct.

III. POTENTIATE LIABILITY AND CRIMINAL RESPONSIBILITY: NEW STANDARDISATIONS FOR INTOXICATION

It is our contention that to continue to predicate the inculpatory effect of intoxication for basic intent crimes on a legalised fiction of subjective recklessness is fundamentally inapt, undermines fair labelling principles, and contradicts the requirement of specificity regarding individuation of offence definition.⁶⁶ The continued pretence of deeming that such offenders are reckless in a criminal fault connotation, as if *mens rea* were present because foresight of the risk of harm described in the gravity of the offence should / ought to have been prevalent if the actor had been sober, is simply a prosecutorial inculpatory tool.⁶⁷ The nature of prior fault, when properly deconstructed, is misunderstood in Anglo-American extant standardisations.⁶⁸ It is not that the intoxicated offender is criminally reckless—in truth they lack subjective recklessness as a fault concept where any risk of harm never crossed their mind because they were inebriated. The stark reality, as a consequence, is not that they were criminally reckless, but that they were criminally responsible. It is criminal responsibility in terms of awareness of the risk of criminality at the T1 stage of individuation that requires further exposition and appropriate modelling.⁶⁹ The concepts of potentiate liability and preventing fault underpin consequentialist liability to this effect, and address fair labelling requirements.

There must exist a moral legitimacy for inculcating the intoxicated “offender” who commits basic intent crimes without

65. MODEL PENAL CODE §§ 2.08, 3, and 9 (Tentative Draft No. 9, 1959).

66. See WILSON, *supra* note 24, at 231-33.

67. Simester, *supra* note 42, at 4.

68. See generally Heidi M. Hurd & Michael S. Moore, *Punishing The Awkward, The Stupid, The Selfish And The Weak: Negligence As Criminal Culpability*, 5 CRIM. L. & PHIL. 147 (2011); Peter Western, *An Attitudinal Theory Of Excuse*, 25 LAW & PHIL. 289 (2006); LARRY ALEXANDER & KIMBERLEY KESSLER FERZAN WITH STEPHEN J MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (Cambridge Univ. Press 2009).

69. See Rebecca Williams, *Voluntary Intoxication – A Lost Cause?*, *supra* note 22 (Eng.) (arguing for a new intoxication offence for the irresponsible acting.; see also Dimock, *The Responsibility Of Intoxicated Offenders*, *supra* note 22.

the prevalence of the designated offence-specific⁷⁰ *mens rea* element at the time of the offence. It is provided by a standardisation of potentiate liability for preventing fault. Inculcated policy rationalisations are derived from abjuration of individual responsibility and attributional liability attached to lack of care as a moral agent determinative of inculcation, and not cognitive states of falsely imputed *mens rea*.⁷¹ Moral culpability should effectively apply in that an individual party must take responsibility for elective choices—drinking or taking drugs: “[I]t should be drunken unawareness, inattention or dangerousness which should be punished rather than allow the courts to continue to impose fictionalised responsibility for a crime where *mens rea* is lacking.”⁷² The epicentre of potentiate liability for intoxicated behaviour conflagrates around the standardisation of harm prevention as part of the legitimate factorisation of conduct criminalisation.⁷³ Harm was perceived by Mill in the sphere of legitimate restriction of individual liberty and autonomy,⁷⁴ and subsequently extrapolated by Feinberg as, “a thwarting; setting back or defeating of an interest.”⁷⁵

A corollary exists between our arguments of potentiate liability and preventing fault attribution to intoxicated “offenders”, and developments in substantive English law on supervening fault and creation of a dangerous situation.⁷⁶ The latter doctrine is delineated by a reverse temporal individuation of harm–fault nexus in specificity.⁷⁷ At T1 the individual may create a dangerous situation without culpability, but this is aligned at T2 with supervening fault created by a failure of responsibility to an extent that is inculpatory.⁷⁸ Supervening fault is attributable where the criminal actor has set in motion a dangerous situation (in *Miller*⁷⁹

70. See generally Paul H Robinson, *Causing The Conditions*, *supra* note 35.

71. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 421 (Little Brown 1978); see also Bob Sullivan, *Making Excuses*, in HARM AND CULPABILITY (Andrew Simester and ATH Smith eds., Oxford Univ. Press 1996) (asserting: “Attributions of liability in Anglo-American criminal law rest on certain key assumptions. There is an assumption of free will or a version of compatibilism or at least that certain reactive attitudes to conduct and the punitive responses they engender remain acceptable practices even if hard determinism be true”).

72. WILSON, *supra* note 24, at 231.

73. See generally TADROS, *supra* note 3, at 207-11.

74. See generally JONATHAN HERRING, *CRIMINAL LAW: TEXT, CASES AND MATERIALS* 22 (Oxford Univ. Press 2008).

75. JOEL FEINBERG, *HARM TO OTHERS, THE MORAL LIMITS OF THE CRIMINAL LAW* 33 (Oxford Univ. Press 1984).

76. See generally ALAN REED & BEN FITZPATRICK, *CRIMINAL LAW* 32-34 (Sweet and Maxwell 2009).

77. Paul R Hoeber, *The Abandonment Defense To Criminal Attempt And Other Problems Of Temporal Individuation*, 74 CALIF. L. REV. 377 (1986).

78. Alan Reed, *Criminal Law*, (2010) ALL ENGLAND ANNUAL REV. 131.

79. R v. Miller [1982] UKHL 6, [1983] 2 A.C. 161 (appeal taken from Eng.).

it was arson and in *Evans*⁸⁰ the risk affected by drug administration related to gross negligence manslaughter) and then comes under an incumbent duty to prevent the harm occurring by taking effective and “reasonable” remedial steps to prevent inculpatory liabilities.⁸¹ Harm and deterrence theories coalesce together to identify liability of an intoxicated offender on similar grounds of reverse conduct prophylaxis, and reflective instead of potentiate liability for morally blameworthy engagement.

The appellate court in *Evans* determined that the “duty” (criminal responsibility) arises when the individual actor realises or ought to have realised the danger; it is this foresight (or otherwise) of causing impairment or future harm that will apply in our new individuated proposals to intoxicated offenders.⁸² The harm-offence reasonableness nexus correlates with potentiate liability and the ambit of criminal responsibility attached to awareness of harm as a moral agent. A defendant who has created a dangerous situation is held to be under a criminal responsibility to mitigate the harm via proportionate reciprocal acts of disengagement: in *Miller* when the defendant accidentally set alight a mattress he became under a responsibility to counteract the damage to the property at risk by telephoning the fire brigade or householder; and in *Evans* the defendant’s supply of drugs supplied to her younger half-sister engendered prospective duties focused upon contacting hospital authorities or other effective care providers.⁸³ The essence is that legitimate focus is accorded to the criminal responsibility of a morally blameworthy defendant who fails to regard the interests of others or risks attendant to culpable (in)activity.⁸⁴ In a generalised context attribution of culpability, aligning together concepts of preventing and supervening fault, is posited by awareness of potential harmful effects attached to lack of moral responsibility. This model for the intoxicated offender may be contextualised in Anglo-American standardisations by evaluation of treatment in four identifiable situations and *dépeçage* principles adopted: Dutch Courage and drinking to commit specific offences; pathological intoxication and imbibing of “therapeutic” intoxicants; involuntary intoxication (outwith alcoholism); and basic intent offences *simpliciter*. The subsequent Parts to this article then concentrate specifically on the alcoholic offender and inter-relationship of potentiate liability within partial defences.

80. R v. Evans, [2009] EWCA (Crim) 650, [2009] 1 W.L.R. 1999 (Eng.). See also Glenys Williams, *Gross Negligence And Duty Of Care in “Drugs” Cases: R v Evans*, CRIM. L.R. 2009, 9, 631.

81. Reed, *supra* note 78.

82. *Id.* at 136-37.

83. *Id.*

84. Sullivan, *supra* note 71.

A. *Dutch Courage: Drinking to Commit Specific Crimes*

The potentiate liability principles apply with broad effect to intoxication induced with the purpose of committing crime. An individual actor who drinks to provide Dutch Courage to commit any designated offence, specific or basic, abjures responsibility to others and is morally culpable to an indefensible extent.⁸⁵ In terms of temporal individuation of offence-definition nexus the prior fault awareness at T1 ought to be added to the unlawful commission of *actus reus* elements at T2 without delineation to inculcate the morally blameworthy agent. Potentiate liability ought to be holistically transmogrified to “Dutch Courage offenders” and to any offence without categorisation: “The actor’s liability for the offence may be based on his conduct at the time he becomes voluntary intoxicated and his accompanying state of mind as to the elements of the subsequent offence.”⁸⁶

By way of postulation, if a defendant forms an intent to kill his wife and then drinks heavily to give himself the courage to do the deed, he would undoubtedly be guilty of murder if, when he shot his wife, he intended to kill her; the fact that the alcohol had removed his fear of completing the deed would be totally irrelevant. If, however, the intoxication “removed” his *mens rea* at T2, yet he still managed to kill his wife, an argument may exist as to liability or otherwise for the specific intent offence of murder. A similar dilemmatic situation would be implicated if the accused, having formed an intent to kill his wife, drinks a large amount of alcohol which induces a latent disease of the mind so that he is unable to appreciate the nature and quality of his acts and in this state kills his wife. Both situations were addressed by Lord Denning in *Attorney General for Northern Ireland*,⁸⁷ where he said:

If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on his self-induced drunkenness as a defence to a charge of killing, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill. So also when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn

85. Roger Shiner, *Intoxication and Responsibility*, 13 INT’L J.L. & PSYCHIATRY 9, 9 (1990); Chester Mitchell, *The Intoxicated Offender - Refuting the Legal and Medical Myths*, 11 INT’L J.L. & PSYCHIATRY 77, 77 (1988); Alan R. Ward, *Making Some Sense of Self-Induced Intoxication*, 45 CAMBRIDGE L.J. 247, 247 (1986).

86. See Paul H. Robinson, *Causing the Conditions*, *supra* note 35, at 35 (finding the actor’s liability at the time he becomes intoxicated properly accounts for different levels of culpability as to causing the subsequent offense).

87. *Att’y Gen. for N. Ireland v. Gallagher*, [1961] UKHL 2, [1963] A.C. 349.

him, coupled with the act which he intended to do and did do.⁸⁸

In both perspectives, envisaged by Lord Denning, there is a problem in that at the time the defendant perpetrated the *actus reus* (T2) he did not possess the *mens rea* and at the time he had the *mens rea* (T1) he did not bring about the *actus reus*. On the other hand, it seems entirely reasonable to say that if a man plans to kill his wife or indeed any lesser crime of violence, drinks to such an extent that he loses his ability to appreciate what he is doing and then while in this state for which he is criminally responsible, kills his wife, he should be convicted of murder.⁸⁹ Potentiate liability and precluding fault implicate liability for all types of offences in this regard, general or specific, predicated upon awareness of harmful effects directly linked to lack of moral responsibility. It is almost as if the individual actor is using himself as an innocent agent, but it is an agency disregarding the interests of others or risks attendant to culpable activity.⁹⁰ A *fortiori* liability is implicated if the defendant is aware that excessive drinking triggers in him a dangerous and aggressive pattern of behaviour.

B. Pathological Intoxication and Non-Dangerous Therapeutic Drugs

Anglo-American constructs of intoxication draw parallels in terms of pathological intoxication where the physiological responses attendant to ingestion are unforeseeable, and demarcations apply between dangerous / non-dangerous drug-taking.⁹¹ The normal rule for basic intent crimes, imputing

88. *Id.* at 381. This view appears to be equally applicable to the new loss of control defence, under sections 54-55 of the Coroners and Justice Act 2009. In the recent Court of Appeal case, *R v. Asmelash*, [2013] EWCA (Crim) 157, [17] (Eng.), it was suggested by counsel that the partial defence should not be available where the defendant had been drinking to give himself Dutch courage for some violent action.

89. William Wilson, *Involuntary Intoxication Excusing the Inexcusable*, 1 RES PUBLICA 25 (1995).

90. A corollary applies here to the decision in *Ryan v. R* (1967) 121 CLR 205, 205 (Austl.), *vis-à-vis* self-induced automatism. The defendant robbed a service station threatening the cashier with a sawn-off rifle; the rifle was loaded and the safety catch was off. He attempted to tie up the cashier with one hand while pointing the rifle at him with the other. Unfortunately, the cashier made a sudden movement and Ryan shot him dead. The appellant contended that he had been startled by the sudden movement and had pressed the trigger "involuntarily". The majority in the High Court of Australia took the view that he had voluntarily placed himself in a situation where he might need to make a split-second decision and the fact that he so responded by pulling the trigger did not make that act an involuntary act in the nature of an act done in a convulsion or epileptic seizure. It was conduct to which attributional liability applied in terms of criminal responsibility and similarly for the intoxicated offender in all types of Dutch courage situations. *Id.*

91. Lawrence P. Tiffany & Mary Tiffany, *Nosologic Objections to the*

constructive liability by the *Majewski* application of “recklessness”, is overtaken by an alternative standardisation of recklessness where intoxication arises from drugs taken for therapeutic reasons: “If [D] does appreciate the risk that [failure to take food / taking the non-dangerous drug] may lead to aggressive, unpredictable and uncontrollable conduct and he nevertheless deliberately runs the risk or otherwise disregards it, this will amount to recklessness.”⁹² In essence, faultless self-induced intoxication by drugs is to be regarded as involuntary intoxication, and therefore outside the scope of the *Majewski* rule.⁹³ These overarching principles were enunciated in *Bailey*,⁹⁴ where the defendant was a diabetic requiring insulin to control sugar levels but failed to follow the medically prescribed treatment, and subsequently claimed that he had assaulted the victim during a period of unconsciousness caused by hypoglycaemia. There was no evidence to suggest that he was aware that failure to take sufficient food might lead to him becoming aggressive or dangerous, and so potentiate liability did not apply. In similar vein the agitated defendant in *Hardie*,⁹⁵ who had taken valium tablets for the first time in order to calm nerves after a relationship ended, and then set fire to a bedroom, arguably had no appreciation of the risk created by the disorientation, and *Majewski* is inapplicable if the drug taken is “wholly different in kind from drugs which are liable to cause unpredictability or aggressiveness.”⁹⁶

Criminal Defense of Pathological Intoxication: What do the Doubters Doubt?, 13 INT’L J.L. & PSYCHIATRY 49, 49 (1990).

92. *Bailey*, [1983] 1 W.L.R. at 765 (Eng.).

93. By way of comparison see *R v. Quick*, [1973] 1 Q.B. 910 at 922 (Eng.) (“A self-induced incapacity will not excuse . . . , nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, . . . failing to have regular meals while taking insulin.”); LAW COMMISSION SCOPING PAPER, INSANITY AND AUTOMATISM (Law Com SP, 2012); Adam Jackson, Nicola Wake & Natalie Wortley, *Insanity and Automatism: A Response to the Law Commission: Part 1*, CRIM. L. & JUSTICE WEEKLY, 176, 50, 731-33 (2012); Adam Jackson, Nicola Wake & Natalie Wortley, *Insanity and Automatism: A Response to the Law Commission: Part 2*, CRIM. L. & JUSTICE WEEKLY, 176, 51-52, 752-54 (2012). But see LAW COMMISSION, DISCUSSION PAPER, INSANITY AND AUTOMATISM (Law Com SP, 2013) (recommending that faultless self-induced intoxication in this context should fall within the parameters of a newly proposed “Recognised Medical Condition” defence).

94. *Bailey*, [1983] 1 W.L.R. at 760 (Eng.).

95. *R v. Hardie*, [1984] EWCA (Crim) 2, [1985] 1 W.L.R. 64 (Eng.); DAVID ORMEROD, SMITH AND HOGAN’S CRIMINAL LAW 314 (Oxford Univ. Press 2011).

96. See *Hardie*, [1985] 1 W.L.R. at [70]. “Since drinking alcoholic liquor is not usually followed by gross intoxication and does not usually lead to the commission of serious injuries, it follows that persons who commit them while grossly intoxicated should not be punished, unless at the time of the sobriety and voluntary drinking, they had such prior experience as to anticipate their intoxication and that they would become dangerous in that condition.” HALL,

It is within the boundaries of pathological intoxication and separate treatment for therapeutic drug-taking that our schematic template for potentiate liability and prior fault derivations of fair labelling receives the clearest endorsement from extant juridical precepts. Criminal responsibility attaches only to a defendant who is morally culpable and who with awareness disregards the interests of others or risks attendant to harmful conduct. The term “recklessness” is used in a particularised context of risk-taking awareness, and in a generalised sense, not requiring foresight of the *actus reus* of any particular crime as mandated in purposive criminal recklessness specificity. Instead, it is utilised to identify recklessness as moral culpability or otherwise and via transmogrification of awareness of a risk that the actor will become aggressive or dangerous (at T1 stage).⁹⁷ Prior fault applies in a pithy sense that reflects the earthy realism behind appropriate criminalised behaviour in this sphere derived from harmful moral agency.⁹⁸

C. Involuntary Intoxication

An individual may not be responsible for his intoxicated state, and consequently moral blamelessness may attach at the T1 stage of potentiate liability. A person may become involuntarily intoxicated in a variety of ways: his drinks may have been laced or he may have been tricked into taking drugs without his knowledge or the drugs may have been forcibly administered. The *Model Penal Code* response has been to establish a presumptive defence for involuntary intoxication⁹⁹ to all types of criminal offence, but

supra note 65, at 556.

97. It is submitted that the word “recklessness” was utilised by the appellate courts in *Bailey* and *Hardie* to refer to the “fault” required by the individual actor in bringing about the condition of automatism. In order for the inculcation of an offence requiring subjective reckless it is apparent that a defendant would need to have been “subjectively reckless” in terms of a different connotation of lack of moral responsibility (preventing fault) in bringing about his or her condition.

98. See SIMESTER & SULLIVAN, *supra* note 27, at 637 (asserting that the essence underlying juridical precepts in this substantive arena, “is a commendable reluctance to subject persons taking drugs for therapeutic benefit to the regime of social protection endorsed by the House of Lords in *Majewski*”).

99. Intoxication which is “not self-induced”. The drafters of the *Model Penal Code* used the term “self-induced” in order to avoid confusion regarding the term “involuntary”, which could be seen to include duress or coercion. Although this article refers to involuntariness throughout in relation to the alcohol dependent defendant, it should be borne in mind that the term is not intended to encompass duress and coercion in this context. There is no statutory definition of “involuntary” intoxication in English law; however, the courts have similarly adopted a restrictive view of the concept. For example, a drink that is surreptitiously laced with alcohol will constitute involuntary intoxication. *R v. Allen*, CRIM. L.R. 1988, 698 (Eng.). Whereas underestimating the potentiate effects of substances will not. *R v. Eatch*, CRIM. L.R. 1980, 650

only where constitutively the actor is deprived of “substantial capacity to conform his conduct to the law.”¹⁰⁰ The resonance herein is computation with uncertain principles related to automatism where capacity for self-control is lost.¹⁰¹ The boundaries between automatism / involuntary intoxication are blurred in this respect, and the solipsistic line-drawing engagement precipitated has precluded common law adoption by many U.S. jurisdictions.¹⁰² The extant position in English law is laid out in the House of Lords judgment in *Kingston*,¹⁰³ and the general principle unfortunately remains that unless relevant as a denial of *mens rea* defence, the moral blamelessness or qualitative culpability of an act does not affect inculcation.¹⁰⁴ The involuntarily intoxicated “offender” remains liable if it is proved that the external elements of a crime were committed at T2 stage with the offence-definitional fault specificity.¹⁰⁵ The gradation of moral culpability only impacts on gravamen of sentence.

It is submitted that substantive doctrinal principles operate capriciously against destabilised “offenders” who have been involuntarily intoxicated. Potentiate liability is not invoked at the T1 stage of temporal individuation, and the morally blameless offender ought to be able to raise an inference for fact-finder determination that but for the disinhibition created involuntarily and without responsibility at T1, no harmful effects at T2 would have been engendered: “The non-conviction of the blameless should be a pervasive principle of substantive criminal law limited only by the need to theorise and practice criminal law as a system of rules and by the exigencies of forensic practicability.”¹⁰⁶ The defendant should have the opportunity to argue that the

(Eng.).

100. MODEL PENAL CODE § 2.08 (4) (a) and (b); Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 424 n.56; *see also* Ingle, *supra* note 43, at 644 (suggesting that, “the involuntary intoxication defense is illusory. Like the Loch Ness monster, it is often discussed, sometimes searched for, but ultimately never convincingly documented”).

101. ASHWORTH, *supra* note 24, at 203-04. *See generally* R v. Coley, McGhee and Harris [2013] EWCA (Crim) 223; R v. Oye [2013] EWCA (Crim) 1725.

102. Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2247 (1992). *See also* Ronnie Mackay, *Intoxication as a Factor in Automatism*, CRIM. L.R. 1982, 146 (“Problems stem from the fact that intoxication is regarded as a plea which is separate and distinct from automatism when this is plainly not so.”).

103. R v. Kingston, [1994] UKHL 9, [1995] 2 A.C. 355 (Eng.); Bob Sullivan, *Involuntary Intoxication and Beyond*, CRIM. L.R. 1994, 272; Stephen Gardner, *Criminal Defences by Judicial Discretion*, 111 L.Q.R. 177, 177 (1995); John Spencer, *Involuntary Intoxication as a Defence*, 54 CAMBRIDGE L.J. 12, 12 (1995).

104. *See* SIMESTER & SULLIVAN, *supra* note 27, at 638–39.

105. As Loughnan notes, “[w]here the moral culpability underpinning the legal approach to voluntary intoxication is absent, the effects of that approach are unpalatable.” Loughnan, *supra* note 10, at 304.

106. Sullivan, *supra* note 71.

allegorical Mr. Hyde personification at stage T2 would not have occurred to Dr. Jekyll without involuntary intoxication at T1 creating disequilibrium and destabilisation. The persuasive burden should rest on a defendant to address lack of prevenient fault in this contextualisation.¹⁰⁷

The adoption of a reverse burden affirmative defence, focusing on lack of prevenient fault, may be supported by three separate arguments highlighted in disparate sections of the commentary to the *Model Penal Code*: (i) most importantly the constitutive facts and attitudinal behaviour (character personification) are within the ambit of the individual actor to fruitfully produce for the court, including motivational pathways; (ii) instances of this type of defence predicated on lack of prevenient fault or culpable awareness at T1 will occur very infrequently, and when they do arise the defence is often unlikely, subject to correction by the defendant; and (iii) the focus on lack of potentiate liability and no disregard for the interests of others at T1 creates an affirmative defence of exceptional pathology attached to moral legitimacy exculpating the radically destabilised “offender”.¹⁰⁸

D. Basic Intent Offences *Simpliciter*

It is time to acknowledge that Anglo-American intoxication doctrine has created a legal fiction in terms of imputed liability for basic intent offences.¹⁰⁹ This constructive liability is predicated not on criminal recklessness but criminal responsibility of a volitional agent, and the prior fault lies in voluntary intoxication. It is attributional culpability derived from potentiate liability at T1 temporal individuation, and applies irrespective of conscious advertence to the risk of ultimate harm. Fair labelling and doctrinal coherence requires a specific offence¹¹⁰ detailing the inculpatory nature of prevenient fault, and potentiate liability, mirroring the German Code standardisation:

Whosoever intentionally or negligently puts himself into a drunken state by consuming alcoholic beverages or other intoxicants shall be

107. See generally FLETCHER, *supra* note 71.

108. See MODEL PENAL CODE AND COMMENTARIES, §5.01, 361 (Official Draft 1962 and Revised Comments 1985).

109. See WILSON, *supra* note 24, at 231.

110. See Rebecca Williams, *supra* note 22 (suggesting, in a different context to potentiate liability, a bespoke offence of “committing (the *actus reus* of offence X) while intoxicated” and suggesting that this “could [in principle] apply across the board”); LAW COMMISSION, LEGISLATING THE CRIMINAL CODE: INTOXICATION AND CRIMINAL LIABILITY 60–61; ¶ 263(2), (Law Com No 229, 1992) (introducing plans for criminal intoxication—“guilty of doing the act while in a state of voluntary intoxication”). See generally Dimock, *The Responsibility of Intoxicated Offenders*, *supra* note 22 (arguing that the “[Canadian courts] treatment of intoxicated offenders is inconsistent across [the intoxication rule] categories and offends important principle[s] of criminal justice and legality”).

liable to imprisonment of not more than five years or a fine if he commits an unlawful act while in this state The penalty must not be more severe than the penalty provided for the offence which was committed while he was in the drunken state.¹¹¹

It is the commission of an unlawful act whilst in a state of voluntary intoxication to which potentiate liability ought to apply in our recalibration of Anglo-American standardisations. The position may be different, however, in the context of a large cadre of offenders who assert that their intoxication is involuntary because of addiction to alcohol or other intoxicants. The boundaries of the *Majewski* bifurcation appear inapposite to the intoxicated alcoholic “offender” who kills as a result of this condition. The delimitation in the U.S., viewing alcoholism as only relevant to denial of “substantial capacity” within self-induced automatism, remains unduly constraining and inapt. It is our perspective, addressed in the subsequent parts of this article, that the condition of alcoholism for the purposes of diminished responsibility, and as a partial defence to murder, must be treated more expansively in our *dépeçage* identifications. The reforms to English law contained in the Coroners and Justice Act 2009, as interpreted by recent juridical authorities, and operating in tandem with novel proposals on classificatory systems, constitute a template for beneficial harmonisation. The first drink need not be taken involuntarily at the T1 stage of individuation, but rather potentiate liability principles mandate a wider consideration of preventing culpability and responsibility.

111. Die Übersetzung [German Criminal Code], Nov. 13, 1998, BGBL I [FEDERAL LAW GAZETTE] § 323a, *amended by* Article 3 of the Law of Oct. 2, 2009, *translated by* PROF. DR. MICHAEL BOHLANDER. *See* LOUGHNAN, *supra* note 10, at 315. (arguing that this approach would “make overt the connection between intoxication and criminal liability, sabotaging the myth that intoxication is some kind of ‘defence’ to a criminal charge”); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 564 (Stevens and Sons 1961) (As Williams poignantly enquired, “[i]f a man is punished for doing something when getting drunk that he would not have done when sober, is he in plain truth punished for getting drunk?”); PAUL H. ROBINSON & JOHN M. DORLEY, JUSTICE, LIABILITY AND BLAME 105-15 (Westview Press 1995) (discussing the varying determinations of liability with respect to a person’s pre-intoxication culpability when committing the offense); *See generally* THOMAS VORMBAUM, A MODERN HISTORY OF GERMAN CRIMINAL LAW (Michael Bohlander ed., Springer 2013). However, the low level maximum penalty in Germany has sparked controversy. German case law illustrates that in some cases where the maximum penalty has been considered insufficient, the courts have reverted to the *action libera in causa* doctrine which arguably undermines the purpose of section§ 323a. Kai Ambos and Stefanie Bock, *Germany*, in GENERAL DEFENCES: DOMESTIC, AND COMPARATIVE PERSPECTIVES (Michael Bohlander & Alan Reed eds., Ashgate Publ’g 2014) (forthcoming). *See also*, Gerhard Kemp, *South Africa*, in GENERAL DEFENCES: DOMESTIC, AND COMPARATIVE PERSPECTIVES (Michael Bohlander & Alan Reed eds., Ashgate Publ’g 2014) (forthcoming).

IV. THE MODEL OF ALCOHOLISM

Anglo-American jurisprudence has struggled to appropriately attribute fault where the chronic alcoholic defendant is concerned, and deontological reasoning has produced bright-line principles, which frequently results in the alcoholic's condition being considered irrelevant to the question of criminal responsibility. The law proceeds on the basis that an individual's conduct is within his / her control and as a result it would not be unjust to attribute fault.¹¹² In contrast, behavioural and medical sciences consider that symptoms of substance-use disorders are invariably external manifestations of a pre-existing cause.¹¹³ The notion that an individual's actions are pre-determined is at odds with legal conceptions of culpability and fault attribution, and it is, therefore, unsurprising that gradations of addiction, which straddle the analytical divide between voluntariness and involuntariness, remain in a befuddled law-psychiatry hinterland.¹¹⁴ This Part of our article outlines the standardisational and definitional perspectives that underpin conflict between the law and psychiatry, and categorisation of the chronic alcoholic's conduct as voluntary or involuntary, in terms of attributional criminal liability. It is suggested herein that this categorisation is fundamentally important in terms of appropriate fault attribution. As noted in Part I, where a defendant's intoxication is deemed to be voluntary at the T1 stage, this intoxication is conjoined with the external elements of the offence at the T2 stage in order to construct liability. In murder cases, *D*'s voluntary intoxication at T1 will only have a bearing on *D*'s culpability at the T2 stage if the prosecution fails to establish the requisite *mens rea*, and this has significant consequences for the alcohol dependent defendant.

Two polarised schools of thought exist *vis-à-vis* alcohol dependence syndrome.¹¹⁵ The first considers alcoholism a recognised condition over which the sufferer exercises no intelligible control, and accordingly as a potentiate form of diminished responsibility in terms of reconstitutive criminal

112. See generally ASHWORTH, *supra* note 24.

113. Boldt, *supra* note 102, at 2304.

114. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 86–113 (Harvard Univ. Press 1987) (discussing the differences between intentionalism and determinism and how liberal discourse privileges the former over the latter). For the purposes of this article we refer to alcohol dependence, addiction, chronic alcoholism, and alcoholism interchangeably. It should be noted, however, that dependence may be “a normal body response to a substance” and is not always symptomatic of addiction. AM. PSYCH. ASS'N, SUBSTANCE-RELATED ADDICTIVE DISORDERS (2013).

115. See LAW COMMISSION, INSANITY AND AUTOMATISM: SUPPLEMENTARY MATERIAL TO THE SCOPING PAPER, *supra* note 19, at 21, ¶¶ 2.58–2.59 (identifying that the first school views alcoholism as a disease, whereas the second school views it as a habit).

liability.¹¹⁶ The second regards addiction as a pattern of learned behaviour resulting from psychological and societal influences.¹¹⁷ Medical and behavioural sciences may be clearly aligned with the former view, which proposes a “less autonomous view of drunkards”¹¹⁸ and suggests that events are the product of an amalgamation of pre-existing factors rendering them inevitable.¹¹⁹ The latter approach is compatible with “intentionalist” criminal justice theory which imposes liability on the assumption that individuals are rational, “phenomenological” and “free will oriented” and accordingly accountable for their conduct.¹²⁰ Imposing liability on the alcohol dependent defendant is counter-intuitive to proponents of the strict determinist approach, which regards individual behaviour as “structuralist” and “amoral”, thereby deserving neither approbation nor reproach.¹²¹ This conflict between “intentionalist” and “determinist” accounts of human conduct has engendered a blurred philosophical compromise, viewing behaviour through a legal prism where individuals are regarded as criminally liable for their conduct in the absence of an applicable defence.¹²² The effect is that complete

116. Julia Tolmie, *Alcoholism and Criminal Liability*, 64 MOD. L. REV. 688, 688–92 (2001); see also MARTIN WIENER, *RECONSTRUCTING THE CRIMINAL: CULTURE, LAW AND POLICY IN ENGLAND 1830–1914* 295 (Cambridge Univ. Press 1990) (identifying that, as early as 1879, it was argued that “drunkenness was an affliction in which self-control is suspended or annihilated”).

117. FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE*, *supra* note 9, at 102 (“Heavy drinkers are people who have over time made a long and complex series of decisions, judgements, and choices of commission and omission that have coalesced into a central activity [i.e. heavy drinking].”); Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 431 (“A very large proportion of new addicts in the United States today are young, psychologically immature, occupationally unskilled, socially uprooted, poor and disadvantaged.”); Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the “Disease Concept of Alcoholism”*, *supra* note 9, at 806 (arguing that alcoholics are not without control over their actions, indeed “on the whole, the alcoholic has chosen this way to handle his problems in life”). See generally VALVERDE, *supra* note 11. See generally MORSE, *supra* note 11.

118. WIENER, *supra* note 116, at 294; see also *id.* at 295–96 (noting that, in 1879, the British Medical Association helped in the cause of “full medicalization of dipsomania” and passing the Habitual Drunkards Act).

119. Boldt, *supra* note 102, at 2304.

120. KELMAN, *supra* note 114, at 86 (emphasizing “the indeterminacy of action and, correlatively, the ethical responsibilities of actors”); HALL, *supra* note 64, at 166–67 (discussing that because defendants are “reasonable” men, “the objective method of fact-finding and the objective standard of liability function accurately and justly in most cases”); Tolmie, *supra* note 116, at 689–92 (discussing the differences between the disease model and the habit model, wherein the latter model reflects the intentionalist theory). It was noted in *Bailey v. United States* that a person “is not to be excused for offending simply because he wanted to very, very badly.” 386 F.2d 1, 4 (5th Cir. 1967).

121. KELMAN, *supra* note 114, at 86.

122. See generally ASHWORTH *supra* note 24.

exculpation will only be permitted where actions may be identified as so pre-determined that the normative presumption of free will is rendered nugatory or, alternatively, where the alcoholic's criminal responsibility for those actions is so impaired that the partial defence of diminished responsibility applies, and this rationale is considered below. This approach to criminal liability is set against the backdrop of an underlying conflict between the "strictly logical" approach, as outlined in Part I, which dictates that intoxication evidence should always be relevant to questions of culpability, and the "absolutist" position, which contends that it would be dangerous to permit a voluntarily intoxicated defendant to escape criminal liability on account of that intoxication.¹²³ Anglo-American attempts to satiate both camps have resulted, as stated in Part I of this article, in voluntary intoxication evidence being relevant only where it negates the *mens rea* for a specific intent offence in English law, and for offences requiring knowledge or purpose in the U.S.¹²⁴ For lesser intent crimes, intoxication evidence is used as a basis to constructively impute liability.¹²⁵ It is only where the defendant's intoxication is involuntary, not self-induced or pathological in nature, that it may have a significant bearing upon the attribution of fault liability,¹²⁶ and we have suggested alternative remodeling centred around potentiate liability and reverse burden in this sphere.

The difficulty in cases involving the chronic alcoholic, however, is that the defendant invariably exhibits determinist and intentionalist features in tandem. A predominant aspect of the syndrome is an inability to control alcohol consumption, but numerous studies demonstrate that those suffering from withdrawal symptoms frequently and volitionally refrain from alcohol intake and many consume intoxicants without becoming addicted.¹²⁷ The notion that the alcohol dependent defendant may

123. Child, *supra* note 28.

124. See Majewski, [1977] A.C. at 474-75; MODEL PENAL CODE, § 2.08(1) ("Except as provided in Subsection (4) of this Section [pathological or not self-induced], intoxication of the actor is not a defense unless it negatives an element of the offense."); LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY, *supra* note 29, at ¶ 1.58 (concluding that neither the strictly logical approach nor the absolutist alternative are ideal); Simester, *supra* note 42, at 3-14.

125. See Majewski, [1977] A.C. 443, and the MODEL PENAL CODE § 2.08 (explaining intoxication relevance and available defences); see also LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY, *supra* note 29; Simester, *supra* note 42, at 14 (discussing the evidentiary nature of the intoxication doctrine).

126. *Id.*

127. FINGARETTE, HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE, *supra* note 9, at 34-38; Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 432 n.93; Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism"*, *supra* note 9, at 804-05.

retain some capacity to choose whether to consume alcohol suggests that the normative presumption of free will has not been completely displaced.¹²⁸ These concerns have resulted in a judicial reluctance to accept the disorder as a valid form of concessionary mitigation. The focus in extant English and U.S. law has been to distinguish voluntary from involuntary intoxication when determining whether the defendant's condition should exist as a valid form of exculpation, rather than accept, as we propound, that the true state of affairs is more complex and individuated between these fictionalised boundaries. The U.S. courts have been inclined to regard intoxication arising from the condition as voluntary. The disorder is regarded as a latent characteristic in the offender, which results in a propensity to consume alcohol.¹²⁹ This suggestion has been heavily criticised as speculative and unsupported.¹³⁰ Nevertheless, this characterisation is fundamentally at odds with notions of exculpation, and, therefore, the defendant's condition is often irrelevant to questions of culpability. In England, more recent jurisprudential authority suggests that the disorder might impair the defendant's responsibility, but it does not totally abrogate or displace free will. The result has been to recognise that alcohol dependence syndrome may have a bearing upon the defendant's culpability, but only in the most exceptional cases,¹³¹ and only to a partial extent.

V. DIMINISHED RESPONSIBILITY AND ALCOHOL DEPENDENCE SYNDROME

The bifurcatory categorisation of the chronic alcoholic's conduct as voluntary or involuntary, and no distinctive hues in-between, is demonstrative of a reluctance to deviate from an antediluvian template pertaining to intoxicated offending as outlined in Parts I and II of our article. This obsession with traditional intoxication doctrine, and inculcated policy considerations,¹³² has led U.S. courts to standardise alcohol dependent defendants according to normative societal expectations of the reasonable sober person. It is our contention that it is inappropriate and inapt to hold the mentally disordered offender

128. See generally Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87.2 J. CRIM. L. & CRIMINOLOGY 482 (1997) (noting how courts expand exculpatory effects of intoxication).

129. V. Dole & Marie Nystander, *Methadone Maintenance and Its Implications For Theories Of Drug Addiction*, in *THE ADDICTIVE STATES* 359 (A. Wickler ed., 1968).

130. AVRAM GOLDSTEIN, ET AL., *THE PRINCIPLES OF DRUG ADDICTION* 474 (1969); see also DELONG, *The Drugs and Their Effects*, in *DEALING WITH DRUG ABUSE: A REPORT TO THE FORD FOUNDATION* (1972).

131. JONATHAN HERRING, ET AL., *INTOXICATION AND SOCIETY: PROBLEMATIC PLEASURES OF DRUG AND ALCOHOL* (Palgrave MacMillan 2013).

132. See generally LOUGHNAN, *supra* note 10.

to this standard, and that the alcoholic defendant's condition ought to be considered more broadly in terms of criminal responsibility and attributional fault liability. The revised diminished responsibility plea in English law, within the purview of the Coroners and Justice Act 2009, and as recently interpreted by the Court of Appeal, provides an appropriate *via media* in terms of accounting for the chronic alcoholic's condition in order to appropriately attribute fault in murder cases, and recognises the responsibility-culpability nexus that should be determinative to this category of "offender". Potentiate liability principles should be deployed more widely in terms of recognition of mental disorder conditions that affect culpability thresholds, and a more balanced appreciation of voluntary / involuntary intoxication is urgently needed.

A review of the contradictory *Model Penal Code* approach is central to our analysis, and provides that "intoxication of the actor is not a defense unless it negatives an element of an offence requiring knowledge or purpose."¹³³ As highlighted in Part I, this constitutes a failure to establish an element of the offence, which may have the effect of reducing a murder conviction to one of manslaughter,¹³⁴ and, as such, it is not a "true" defence, in contrast to other cognate defences.¹³⁵ If, however, the defendant's intoxication is not self-induced or is pathological in nature, and, as such, he lacks substantial capacity to appreciate its criminality or to conform his conduct to the requirements of the law,¹³⁶ he will be entitled to an outright acquittal.¹³⁷ The focus of the U.S. courts has, therefore, been to distinguish "between incapacity and indisposition, between those who can't and those who won't, between impulse irresistible and impulse not resisted."¹³⁸ This approach is akin to trying to pinpoint the exact moment at which Dr. Jekyll lost control and was taken over by Mr. Hyde. It ignores the interim period where Dr. Jekyll was "losing hold of his original and better self . . ."¹³⁹ The imputation is that the chronic alcoholic is viewed in the U.S. through the legal prism of automatism rather

133. MODEL PENAL CODE § 2.08(1); *see also id.* § 2.08(2) (showing where recklessness establishes an element of the offence, an actor's unawareness of self-induced intoxication is immaterial).

134. *See id.* § 44.02 (rejecting the murder-by-degrees approach); *see also* LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE (Law Com No 304, 2006) (recommending the rejection of a hierarchical restructuring of homicide offenses).

135. Andrew Simester, *Intoxication is Never a Defense*, 1 CRIM. L.R. 3, 14 (2009).

136. MODEL PENAL CODE AND COMMENTARIES §§ 2.08, 3, 363.

137. *Id.* § 2.08(4)

138. *United States v. Moore*, 486 F.2d 1139, 1182 (D.C. Cir. 1973); *see also* Bonnie, *supra* note 21 (asserting lack of objective basis for determining undeterrable from the merely undeterred).

139. STEVENSON, *supra* note 1, at 59.

than involuntary intoxication. It is only where there has been a total lack of volitional conduct (the language of non-insane automatism) that alcohol dependence is supererogatory. If this threshold is not reached then the intoxicated “offender” is treated within the purview of voluntary intoxication and potentiate liability applies in this circumscribed sphere. In this regard, the alcohol dependent defendant’s conduct is assessed according to the normative expectations society has of the sober person, and the risks that would have been aware to non-alcoholics in terms of preventing fault and criminal liability. The external elements of the offence at T2 are aligned with the defendant’s “voluntary” consumption of alcohol at the T1 stage, and liability is accordingly established, even though the actor was operating under the baneful influence of the syndrome. The defendant’s intoxication is only relevant at the T2 stage where the offence is regarded as requiring specific intent, and the substance use prevented the formulation of the culpable state of mind. This principle applies whether or not the defendant suffers from alcohol dependence syndrome.¹⁴⁰ Potentiate liability in a consequentialist sense is obscured in terms of legitimate import and moral blameworthiness.

The narrow view that there exists an element of reasoned choice when an addict knowingly uses the substance to which he is addicted, rather than participating in a treatment or rehabilitation programme,¹⁴¹ has also resulted in the rejection of alcohol dependence syndrome as a bespoke mental disease or defect, within U.S. jurisdictions.¹⁴² The outcome is that the chronic alcoholic is unable to rely upon the syndrome in order to raise the insanity defence,¹⁴³ which provides that a person is not to be held criminally responsible for his acts if, at the time of that conduct and as a result of a mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform that conduct to the requirements of the law.¹⁴⁴

140. MODEL PENAL CODE § 2.08(1); *see also* LOUGHNAN, *supra* note 10.

141. *Moore*, 486 F.2d at 1183.

142. *Heard*, 348 F.2d at 44.

143. *Bailey*, 386 F.2d at 3-4; *see also* *United States v. Coffman*, 567 F.2d 960, 963 (10th Cir. 1977); *Yassen v. United States*, 1129 U.S. 94 (1974) (being involuntarily under the influence of drugs at the time of the crime is not a legal equivalent of insanity); *Moore*, 486 F.2d at 1181; *United States v. Romano*, 482 F.2d 1183, 1196 (5th Cir. 1973); *United States v. Stevens*, 461 F.2d 317, 321 (7th Cir. 1972); *Berry v. United States*, 286 F. Supp. 816, 820 (E.D. Pa. 1968) (rev. on other grounds), 412 F.2d 189 (3d Cir. 1969); *Green v. United States*, 383 F.2d 199, 201 (D.C. Cir. 1967) (cert. denied), 390 U.S. 961 (1968); *Gaskins v. United States*, 410 F.2d 987, 989 (D.C. Cir. 1967); *United States v. Freeman*, 357 F.2d 606, 625 (2d Cir. 1966); *see also* *Fingarette, Addiction and Criminal Responsibility*, *supra* note 9, at 424-25 (asserting that the medical profession lacks a consensus over whether addiction is a disease).

144. *Blake v. United States*, 407 F.2d 908, 916 (5th Cir. 1969) (en banc).

Intoxication¹⁴⁵ is not sufficient to establish a mental disease¹⁴⁶ and the “terms ‘mental disease or defect’ do not include abnormality manifested by repeated criminal or otherwise anti-social conduct.”¹⁴⁷ Alcohol addiction per se is erroneously regarded as the external manifestation of a latent character defect, which results in a propensity to consume intoxicants, and is, therefore, incompatible with exculpatory doctrines in the U.S.:¹⁴⁸

A mere showing of . . . addiction, without more, does not constitute “some evidence” of mental disease or insanity so as to raise the issue of criminal responsibility.¹⁴⁹

Societal acknowledgement that certain mental diseases should be relevant to questions of criminal responsibility does not extend to alcohol dependence syndrome,¹⁵⁰ and in this regard, the definition of “mental disease or defect” is considered to be a matter of legal and not medical judgment.¹⁵¹ Individuation characteristics are engrafted whereby the defendant’s “anti-social” conduct, in terms of repetitively drinking to excess, at T1, is adjoined with the external elements of the offence at T2 and the defendant’s alcohol dependence syndrome will only be considered relevant in limited circumstances.

The courts have reluctantly allowed substance dependence evidence to be presented in court where it is used to establish that at the time of the offence, the defendant was suffering from a psychological condition, which pre-dated the physiological dependence,¹⁵² or that the alcohol was used in a bid to alleviate or assuage the symptoms of an underlying condition, for example, depression or anxiety disorder.¹⁵³ In these cases, substance dependence evidence is utilised to prove that the defendant suffered from the underlying condition at the time of the offence

145. Intoxication means a disturbance of mental or physical capacities resulting from the introduction of substances to the body. MODEL PENAL CODE § 2.08 (5)(a).

146. MODEL PENAL CODE, § 2.08(3) (1962).

147. *Id.* § 4.01(2) (1962).

148. Dole & Nystander, *supra* note 129; AVRAM ET AL., *supra* note 130; *see also* DELONG, *supra* note 130, at 212.

149. *Heard*, 348 F.2d at 44. *See also Doughty*, 396 F.2d at 130 (stating that imprisoning a chronic alcoholic does not constitute “cruel and unusual punishment” under the 8th Amendment).

150. *Freeman*, 357 F.2d at 625.

151. *State v. Lyons*, 731 F.2d 243, 246 (5th Cir. 1984). The criminal law cannot “vary legal norms with the individual’s capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable, such as the mental disease or defect which may establish irresponsibility.” MODEL PENAL CODE AND COMMENTARY §§ 2.09, 6 (Tentative Draft No. 10, 1960).

152. *Robinson v. California*, 370 U.S. 660, 672 (1962); *Watson v. United States*, 439 F.2d 442, 460 (D.C. Cir. 1970); *Gaskins*, 410 F.2d at 989; *Heard*, 348 F.2d at 499; *Green*, 383 F.2d at 201.

153. *United States v. Cooper*, 465 F.2d 451, 452 (9th Cir. 1973); *United States v. Carter*, 436 F.2d 200, 201–02 (D.C. Cir. 1970).

and not to prove alcohol dependence per se.¹⁵⁴ Similarly, where the defendant suffers from permanent or transient psychosis as a result of the repeated insult from the intoxicants, evidence of the defendant's addictive behaviour is admissible in order to prove that psychosis.¹⁵⁵ Where the ingestion of alcohol causes a mental disease or defect outwith substance dependence per se, the defendant will normally be able to rely upon that mental disease or defect to support his contention that he lacked criminal responsibility, notwithstanding the fact that the defendant's alcohol intake was voluntary.¹⁵⁶ Evidence of alcohol dependence syndrome will be relevant at the T2 stage where it is used to establish that at the time of the offence the defendant suffered from damage to the brain or nervous system;¹⁵⁷ brain pathology or induced psychosis; or an alternative disorder as a result of the physiological dependence.¹⁵⁸ It is only where the dependence syndrome is so severe that it results in brain damage or an equally damaging condition that it will be relevant to the defendant's culpability, and, even then, its practical utility is doubted:

To us it seems to rest on the proposition that, assuming . . . addiction itself is neither a mental disease nor a defect, yet the two are often to be found in association, so that an addicted person is more likely to suffer from some mental disorder than is one who is not addicted. By a parity of reasoning, since combat veterans as a group are self-evidently more likely to have suffered the loss of a physical member than is the populace at large, evidence of whether a party is a combat veteran should be received on the issue whether he has lost a leg. Or, to take a less extreme example, since because of light skin pigmentation persons of Scandinavian ancestry are more subject to skin cancer than are others, the family tree of a suitor should be received in evidence when his skin cancer is at legal issue. The flaw in both illustrations

154. *Lyons*, 731 F.2d at 2463.

155. *Fitts v. United States*, 484 F.2d 108, 113 (10th Cir. 1960); *People v. Kelly*, 516 P.2d 875, 882-83 (Cal. 1973).

156. *Commonwealth v. Sheehan*, 383 N.E.2d 1115, 1119 (Mass. 1978).

157. JOHN BURKOFF & RUSSELL WEAVER, *INSIDE CRIMINAL LAW* 233 (Aspen Publishers 2008). "[T]he great weight of legal authority clearly supports the view that evidence of . . . addiction, standing alone and without any other physiological and psychological symptoms involvement, raises no issue of a mental disease or defect." *Lyons*, 731 F.2d at 245. In *Lyons*, the defendant (Lyons) was charged with twelve counts of knowingly and intentionally securing controlled narcotics by misrepresentation, fraud, deception and subterfuge in violation of 21 U.S.C. § 843 (a)(3) (1976) and 18 U.S.C. § 2 (1976). *Id.* at 244. At trial, Lyons attempted to rely on the insanity defence, asserting that he lacked substantial capacity to conform his conduct to the requirements of the law as a result of the physiological and psychological effects of his drug dependence. *Id.* Cf. *R v. Tandy*, [1989] 1 W.L.R. 350 (CA) (insanity defence only available if addiction rendered consumption of alcohol involuntary and intoxication impaired defendant).

158. *Robinson*, 370 U.S. at 672; *Watson*, 439 F.2d at 460; *Gaskins*, 410 F.2d at 989; *Heard*, 348 F.2d at 989; *Green*, 383 F.2d at 201.

seems evident: where evidence bearing directly on a legal question is available, that involving tangential matters, even though perhaps logically relevant in theory, is of small practical value.¹⁵⁹

A further anomaly applies in that the *American Law Institute* was prepared to accept pathological intoxication, the status of which is still being examined,¹⁶⁰ as providing an affirmative defence, while rejecting alcohol dependence syndrome unless equated with brain damage or an alternative mental disorder as a valid form of mitigation. Pathological intoxication is defined as the rapid onset of acute intoxication following consumption of alcohol, which is insufficient to cause intoxication in most people.¹⁶¹ In this regard, the condition could be categorised as involuntary on the basis that the defendant is unaware that the substance would intoxicate him “to the extent it did.”¹⁶² The *Model Penal Code* distinguishes “intoxication which is not self-induced”, defined as “merely accidental”, from “pathological intoxication” which is intoxication which takes the individual by surprise.¹⁶³ The drafters of the *Model Penal Code* noted a particularised rationale for this bespoke category:

[A] provision was required because of a concern that bizarre behavior caused in part by an abnormal bodily condition (in some cases, in others the atypical intoxication can be related to mental disturbance), would not seem to result from “mental disease” and thus would not fall under section 4.01 [the insanity defence].¹⁶⁴

The effect is to allow an affirmative defence where the defendant suffers from a mental condition short of insanity, notwithstanding the voluntary consumption of alcohol.¹⁶⁵ A more nuanced view has been applied to the pathologically intoxicated offender that ought to apply similarly to the alcoholic. In both situations it is potentiate liability and preventing fault at the T1 stage of inculcation that is fundamental in terms of culpability and criminal responsibility. Unfortunately, this contemporary

159. *Lyons*, 731 F.2d at 246-47.

160. See Tiffany, *Pathological Intoxication and the Model Penal Code*, *supra* note 43, at 768 (providing an in-depth analysis of the flaws inherent within arguments that pathological intoxication is not a valid condition); Tiffany & Tiffany, *supra* note 91, at 49-75. See generally Note, *Pathological Intoxication and the Voluntarily Intoxicated Criminal Offender*, 1969 UTAH L. REV. 419 (1969).

161. MODEL PENAL CODE § 2.08(5).

162. Tiffany, *Pathological Intoxication and the Model Penal Code*, *supra* note 43, at 768. See also Paul H. Robinson, *Causing The Conditions*, *supra* note 35.

163. Tiffany, *Pathological Intoxication and the Model Penal Code*, *supra* note 43, at 768.

164. MODEL PENAL CODE AND COMMENTARIES § 2.08, 7, 12 (Tentative Draft No. 9, 1959).

165. Tiffany, *Pathological Intoxication and the Model Penal Code*, *supra* note 43, at 768.

approach to pathological intoxication has met resistance amongst the States, on grounds that the availability of an affirmative defence is too broad and also over confusion regarding the true nature and extent of the condition.

The exclusionary approach to alcohol dependent defendants is mistakenly supported by a number of academicians who universally claim that concepts of addiction cannot be “usefully adapted to the context of legal argument.”¹⁶⁶ The suggestion is that studies which show that drinkers volitionally abstain from alcohol “believe the myth” of loss of control, and, as such, alcoholism is simply a “way of life”, rather than a disease;¹⁶⁷ moreover, there “is no reason to assume whatever is a medically recognised symptom must be legally involuntary. A symptom is simply an indicator or manifestation of disease.”¹⁶⁸ This reductionist perspective ignores the fact that alcoholism is a recognised condition over which the sufferer may exercise no intelligible control.¹⁶⁹ It does not follow that alcohol dependency syndrome should not be considered a relevant factor in terms of assessing culpability, simply because the defendant’s free will has not been completely displaced. It is not self-induced automatism and total destruction of volitional control that is at issue, but rather partial lack of responsibility at T2 affected by blameworthiness at T1. The alcoholic’s “decision” to consume alcohol at the T1 stage is fundamentally different from the decision made by the sober person. The present situation, which categorises conduct as sane or insane, and the chronic alcoholic’s intoxication as voluntary or involuntary, is unjust since it fails to consider the “wide range of rational and control capacities” exhibited by defendants.¹⁷⁰ Where the defendant’s intoxicated state is the by-product of a disease his “moral culpability is attenuated” such that it is appropriate that the condition is considered when attributing fault.¹⁷¹

If criminal punishment should be proportionate to desert, as virtually all criminal law theoreticians believe, blanket exclusion of doctrinal mitigating claims and treatment of mitigation solely as a matter of sentencing discretion is not fair.¹⁷²

166. Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 413-34.fn42.

167. FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE*, *supra* note 9, at 99. MORSE, *supra* note 11.

168. Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 424.

169. Tolmie, *supra* note 116, at 688.

170. Stephen Morse, *Diminished Rationality: Diminished Responsibility*, OHIO ST. J. CRIM. L. 289, 289 (2003). *See generally* Stephen Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 24 (1984).

171. ARLIE LOUGHNAN, *supra* note 10, at 307.

172. Morse, *Diminished Rationality: Diminished Responsibility*, *supra* note 170, at 297. Attempts to afford consideration to a defendant’s mental

In cases where a defendant's alcohol dependence syndrome potentially has a bearing upon his responsibility for the offence, it is appropriate that the condition is considered in terms of preventing liability and criminal responsibility: "[t]he proper way to protect ourselves from the dangerously mentally ill is not through distortion of the criminal justice system," but by ensuring that blame is appropriately assigned.¹⁷³ An alternative approach predicated on the defendant's impaired capacity would be preferable, and the mechanistic bright-line standardisations in the U.S. to mental disorder, including alcoholism, have been unfortunate, and mistakenly predicated on improper judicial constructs of either insanity or automatism.

Attempts to introduce a partial diminished responsibility plea to the U.S. occurred by sleight of hand "through the judicial back door."¹⁷⁴ Disinclination to permit a concessionary defence, or "an all-embracing unified field theory" which could exculpate "anyone whose capacity for control is insubstantial"¹⁷⁵ resulted in the diminished capacity defence¹⁷⁶ being met with almost "universal hostility".¹⁷⁷ Of the five successful attempts to introduce the mitigation for murder, four were removed upon adoption of the *Model Penal Code*¹⁷⁸ and the fifth was abolished following public

abnormality through the doctrines of diminished responsibility and extreme mental or emotional disturbance have proved largely unsuccessful. LAW COMMISSION, PARTIAL DEFENCES TO MURDER App. F, ¶¶ 5-6 (Law Com No 290, 2004). See generally Douglas Brown, *Disentangling Concessions to Human Frailty: Making Sense of Anglo-American Provocation Doctrine through Comparative Study* 39 N.Y.U. J. INT'L L. & POL. 675 (2007).

173. Robinson, *Causing The Conditions*, *supra* note 35, at 1.

174. Morse, *supra* note 170, at 24.

175. *Moore*, 486 F.2d at 1182.

176. The term "diminished capacity" is used interchangeably to refer to the partial defence of diminished responsibility and also a denial of *mens rea* for offences requiring purpose or knowledge as per section 2.08 of the *Model Penal Code*. The latter categorisation is misleading on the basis that section 2.08 is not used to consider whether the defendant exhibits a lower level of culpability, rather it has the effect of reducing a murder conviction to one of manslaughter where the defendant lacks the requisite *mens rea* for the offence charged. References made to diminished capacity and / or diminished responsibility throughout this article apply to the partial defence rather than murder reductions predicated on a lack of *mens rea*. See generally Paul H. Robinson, *Abnormal Mental State Mitigations of Murder: The U.S. Perspective*, in LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES (Michael Bohlander & Alan Reed eds., Ashgate Publ'g 2011). See also Morse, *supra* note 170, at 24.

177. Phillip E. Has, *Drug Addiction of Related Mental State as Defense to Criminal Charge*, 73 A.L.R.3d 16, 16 (1991).

178. MODEL PENAL CODE § 1.05 (1). See also, Brown, *supra* note 172, at 675. The diminished responsibility defence exists in limited form where it is explicitly included in codified homicide schemes. HAW. REV. STAT. § 701-102 (West 2002); OHIO REV. CODE ANN. § 2901.03 (LexisNexis 2005); OR. REV. STAT. ANN. § 161.035 (West 2001); UTAH CODE ANN. § 76-1-105 (West 2008).

rioting in response to the decision in *People v White*.¹⁷⁹ White had assassinated Mayor Moscone and Harvey Milk in 1978. At his trial for first-degree murder, White successfully pleaded diminished capacity on grounds of a depressive condition. During the course of the trial it was suggested that a symptom of the depression was White's compulsion for junk food. Diminished responsibility subsequently became derisively dubbed the "twinkie defense",¹⁸⁰ before being dismissed as little more than "tea leaves and crystal balls."¹⁸¹ Commenting on the risks associated with the diminished responsibility defence, the drafters of the *Model Penal Code* stated:

By evaluating the abnormal individual on his own terms, [diminished responsibility] decreases incentives for him to behave as if he were normal. It blurs the law's message that there are certain minimal standards of conduct to which every member of society should conform. By restricting the extreme condemnation of liability for murder to cases where it is warranted in a relativistic sense, diminished responsibility undercuts the social condemnation. In short, diminished responsibility brings formal guilt more closely in line with moral blameworthiness, but only at the cost of driving a wedge between dangerousness and social control. The MPC does not recognise diminished capacity as a distinct category of mitigation.¹⁸²

The effect is to adjudge the chronic alcoholic according to normative standards of societal behaviour,¹⁸³ and to an individuated allegorical Dr. Jekyll personification that is heavily prescribed, in an aim to deter him from criminal conduct. This personified approach to culpability is fundamentally flawed on the basis that deterrence cannot be achieved by punishing an individual for acts beyond their control.¹⁸⁴ It ignores the fact that the defendant may not have had the capacity and opportunity to conform his conduct to the requirements of the law as a result of the baneful effects of the syndrome,¹⁸⁵ and thereby inappropriately

179. 172 Cal. Rptr. 612, 612 (Cal. Dist. Ct. App. 1981); CAL. PEN. CODE § 188 (West 2003); *People v Bobo*, 271 Cal. Rptr. 277, 290 (Cal. Dist. Ct. App. 1990). See also the film, *THE TIMES OF HARVEY MILK*.

180. Kelly Snider, *The Infamous Twinkie Defense-Fact or Fiction?*, 9 ANNALS AM. PSYCHOTHERAPY ASSOC. 42, 43 (2006).

181. Jay Ziskin, Ph.D LL.B, Professor, Psychology, Cal State, Un Los Angeles, at the hearings held Tuesday, December 4, 1979, in Doris Hardyman, Comment, *The Diminished Capacity Defense in California; An Idea Whose Time Has Gone?* 3 Glendale L. Rev. 311, 319 (1978-79).

182. MODEL PENAL CODE AND COMMENTARIES § 210.3(1)(b).

183. ASHWORTH, *supra* note 24.

184. Boldt, *supra* note 102, at 2289. "Men are not to be hanged for stealing horses, but that horses may not be stolen." GEORGE SAVILE (MARQUIS OF HALIFAX) CHARACTER OF KING CHARLES THE SECOND: POLITICAL, MORAL AND MISCELLANEOUS THOUGHTS AND REFLECTIONS 114 (J & R Tonson 1750). See also Ingle, *supra* note 43 (stating that punishment will not deter antisocial behaviour when the conduct is not a product of the defendant's own volition).

185. HERBERT HART, PUNISHMENT AND RESPONSIBILITY (Oxford Univ. Press 2008).

treats the chronic alcoholic as a “mere vehicle through which to deter others.”¹⁸⁶ Punishment is inequitably attached to the conduct of a defendant whose mental abnormality may have substantially impaired his or her decision-making capacity at the time of the offence.¹⁸⁷ The inappropriate attribution of fault liability in cases of this context cannot be justified on public policy grounds, and a more enlightened template is needed to reflect potentiate liability and “actual” responsibility at the T1 stage of intoxication.¹⁸⁸

A contradictory approach applies to partial defences in general in that the *American Law Institute* was prepared to accept a “substantial enlargement” of the traditional plea of provocation in order to embrace psychological failings on the part of the defendant.¹⁸⁹ The formulation was never meant to create a conjoined standardisation, embracing diminished responsibility within the boundaries of mental disturbance: the doctrine reduces a murder conviction to manslaughter where the defendant kills in response to an extreme mental or emotional disturbance, for which a reasonable explanation or excuse is provided.¹⁹⁰ The provision met with considerable resistance amongst the states, with not a single state being prepared to adopt the “Extreme Mental or Emotional Disturbance” defence in its entirety.¹⁹¹ Of the few states to adopt the provision, most repudiated the term “mental”.¹⁹² This is reflective of a generalised reluctance to accept murder reductions to manslaughter predicated on mental abnormality within the U.S.,¹⁹³ and effectual rejection of alcohol dependence

186. *Moore*, 486 F.2d at 1240-41 (Wright J., dissenting)

187. Boldt, *supra* note 102, at 2247.

188. See Paul H. Robinson & John M. Darles, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454-55 (1997) (stating that liability should be proportionate to the person’s level of culpability towards the conduct constituting the offense).

189. James Chalmers, *Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism*, CRIM. L.R. 2004, 198, 211.

190. MODEL PENAL CODE AND COMMENTARIES § 210.3(1)(b).

191. LAW COMMISSION, PARTIAL DEFENCES TO MURDER, *supra* note 172, at App. F, ¶ 5. See also Susan Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 202 (2005) (stating that Arkansas is one of the few jurisdictions that followed the *Model Penal Code*’s extreme and mental or emotional disturbance rule). The problems associated with delimiting the scope of the EMED defence have resulted in controversial case law and confusion at appellate court level. See, e.g., *Parker v. Matthews*, 132 S. Ct. 2148, 2151-53 (2012) (deciding whether the Sixth Circuit erred in rejecting the Kentucky Supreme Court’s interpretation of extreme emotional disturbance in Kentucky’s murder statute). See also Stephen Garvey, *Passion’s Puzzle*, 90 IOWA L. REV. 1677, 1690 (2005) (explaining that few jurisdictions have adopted the *Model Penal Code*’s extreme emotional disturbance in place of traditional provocation).

192. LAW COMMISSION, PARTIAL DEFENCES TO MURDER, *supra* note 172, at App. F, ¶¶ 5-6.

193. Morse, *supra* note 170, at 24. See also Brown, *supra* note 172 (discussing the unwillingness of American jurisdictions to reduce murder to manslaughter on the basis of mental abnormalities).

syndrome as a relevant ground for abjuration of criminal responsibility outwith automatism or insanity.

The inherent injustice in failing to consider alcohol dependency syndrome as a potentiate partial defence to murder when assessing a defendant's culpability was recently highlighted by the Privy Council following the Trinidad and Tobago case of *Daniel*,¹⁹⁴ engaging a 25 year-old defendant, with no previous convictions. On the day of the killing, the defendant had smoked "blacks"¹⁹⁵ and consumed vast quantities of rum. According to his evidence, the defendant had driven his friend and the victim to a secluded area where they listened to rock music. When the victim rejected the defendant's sexual advances, "a demon" rose up inside him and he choked her for over a minute,¹⁹⁶ before slitting her throat and stabbing her in the chest and stomach. At trial, it was argued that the defendant did not have the requisite *mens rea* for murder due to intoxication. The partial defence of diminished responsibility was not raised.¹⁹⁷ The jury found that the defendant had the requisite *mens rea* and the trial judge subsequently issued the death penalty.¹⁹⁸

The defendant appealed to the Privy Council,¹⁹⁹ following the Court of Appeal's refusal to consider fresh evidence which intimated that the defendant was suffering from a personality

194. *Daniel v. The Queen*, [2012] UKPC 15 (P.C.) (appeal taken from Trinidad and Tobago).

195. "Blacks' are marijuana cigarettes rolled with crack cocaine." *Daniel*, [2012] UKPC at [7].

196. The defendant told police, "[i]t was a demon inside my head . . . I did not know what I was doing. I was seeing a dark object in front of me and I did not know what it was. I was not seeing or hearing Suzette in front of me." *Daniel*, [2012] UKPC at [7].

197. OFFENCES AGAINST THE PERSON ACT, 1861, 24 and 25 Vict., c. 11, § 4A (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the murder. (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

Id. The provision is identical to the original English diminished responsibility plea, under s.2 of the Homicide Act 1957, considered below.

198. For an assessment of the use of the death penalty in retentionist States, see INTERNATIONAL COMMISSION AGAINST THE DEATH PENALTY, THE DEATH PENALTY AND THE MOST SERIOUS CRIMES (DPIC Jan. 2013), available at http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes_final_6Feb2013.pdf (outlining a country by country overview of criminal offences punishable by death).

199. It was also suggested that the evidence casts doubt upon the voluntariness and therefore the admissibility of the statement that he made to the police under caution, however, the main submission relates to the partial defence. *Daniel*, [2012] UKPC at [1].

disorder,²⁰⁰ alcohol dependence and drug induced psychosis, which may have had a “direct impact on [his] level of cognitive and social functioning”²⁰¹ at the time of the offence.²⁰² The prosecution alleged that Daniel should not be entitled to rely on the partial defence on grounds that the initial decision not to raise diminished responsibility at the trial was a tactical one. It was asserted that the psychiatric reports available at the time had the potential to undermine the defence argument that the defendant lacked the requisite *mens rea*.²⁰³ The Privy Council accepted that it is well-established that one of the factors likely to weigh heavily against the reception of fresh evidence in an appeal is “a deliberate decision by a defendant whose decision-making facilities are unimpaired not to advance before the trial jury a defence known to be available.”²⁰⁴ The Privy Council concluded, however, that the diminished responsibility defence was not raised because the initial psychiatric reports did not suggest that the plea was

200. It was noted that this Daniel’s personality disorder did not include “anti-social” or “sadistic sexual aspects.” *Daniel*, [2012] UKPC at [19]. Emotionally Unstable (Borderline) Personality Disorder is defined by the World Health Organisation as:

A personality disorder in which there is a marked tendency to act impulsively without consideration of the consequences, together with affective instability. The ability to plan ahead may be minimal, and outbursts of intense anger may often lead to violence or ‘behavioural explosions’; these are easily precipitated when impulsive acts are criticised or thwarted by others. Two variants of this personality disorder are specified, and both share this general theme of impulsiveness and lack of self-control.

WORLD HEALTH ORGANISATION, INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS 10TH REVISION (ICD-10), available at <http://apps.who.int/classifications/icd10/browse/2010/en> [hereinafter WHO]

201. *Daniel*, [2012] UKPC at [19].

202. *Id.* at [18].

203. *Id.* at [20]. The initial psychiatric reports suggested that the defendant was “not mentally ill but [had] a personality disorder with . . . psychopathic features” and that “it is not possible to make a case for insanity or diminished responsibility for the alleged commission of this murder as these personality disorders do not constitute an abnormality of mind that could support such a position.” *Id.* at [10] and [12]. It is not uncommon for the diminished responsibility plea to be precluded to those defendants suffering from psychopathic personality disorder. *See also, e.g.*, *Galbraith v H.M. Advocate*, (2002) J.C. 1 (Scot.). *See also* James Chalmers, *Partial Defences to Murder in Scotland: An Unlikely Tranquility*, in *LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES* 167-83 (Michael Bohlander & Alan Reed eds., Ashgate Publ’g 2011); SCOTTISH LAW COMMISSION, REPORT ON INSANITY AND DIMINISHED RESPONSIBILITY ¶ 3.40 (Scottish Law Com No 195, 2004). The Scottish diminished responsibility plea was recently codified under section 168 of the CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010.

204. *R v Erskine and Williams*, [2010] 1 W.L.R. 183 [90] (quoting *R v Criminal Cases Review Commission*, Ex p Pearson, [1993] 3 ALL ER 498, 517.

available, and further noted that a tactical decision should not result in conclusive objections in every case since “the overriding discretion conferred on the court enables it to ensure that, in the last resort, defendants are sentenced for the crimes they have committed, and not for psychological failings to which they may be subject.”²⁰⁵ The decision in *Daniel* has a particular resonance for Anglo-American categorisations of intoxicated offenders. It is vitally important that “psychological failings” of a defendant, including alcoholism, are brought to the attention of fact-finders as part of their normative assessments in a murder case. In this context, the “salutary words” of the Privy Council in *Daniel* provide a reminder that it is essential to properly reflect on gradations of culpability and responsibility of the destabilised offender.²⁰⁶

The position in England is that alcohol dependence syndrome may be relied upon for the purposes of the diminished responsibility defence within constrained boundaries.²⁰⁷ The partial defence represents a bespoke form of mitigation, which has the effect of reducing a murder conviction to one of voluntary manslaughter where the defendant’s abilities are substantially impaired²⁰⁸ as a result of the defendant suffering from a mental abnormality short of insanity.²⁰⁹ Previously there had been a “rigid dichotomy between sane or insane, responsible or not responsible, bad or mad.”²¹⁰ Diminished responsibility in this respect supplied the law with “a new moral and social barometer” upon which a mentally abnormal defendant’s lower level of responsibility could be measured.²¹¹

Under the original wording of section 2 of the Homicide Act 1957 the defendant was required to prove²¹² an “abnormality of mind.” Fact-finders were mandated to consider whether the abnormality of mind arose from a condition of arrested or retarded development of mind or any inherent causes, or alternatively, whether the abnormality was “induced by disease or injury.” The jury was charged to determine whether the abnormality of mind “substantially impaired” the defendant’s “mental responsibility” for the killing.

The English courts initially struggled with the notion of an

205. *Daniel*, [2012] UKPC at [23].

206. *Id.*

207. Homicide Act 1957, s.2 (1) as amended by the Coroners and Justice Act 2009, s. 52.

208. *R v Ramchurn*, [2010] EWCA (Crim) 194. *See also* Nicola Wake, *Substantial Confusion Within Diminished Responsibility*, 75 J. CRIM. L. 12 (2011); *R v Lloyd (Derek William)*, [1967] 1 Q.B. 175 (Eng.).

209. LAW COMMISSION, PARTIAL DEFENCES TO MURDER, *supra* note 172, at ¶¶ 7.6-7.7.

210. *Id.* at ¶ 6.52.

211. REED & WAKE, *supra* note 15, at 184.

212. On the balance of probabilities.

intoxicated defendant being afforded the concessionary defence, and provided a straitened test that alcohol dependence syndrome would only be relevant if the defendant suffered brain damage as a result, as in the U.S., or alternatively, if the first drink consumed on the day of the killing was truly involuntary.²¹³ It was treated as axiomatic in *Tandy* that intoxication *simpliciter* was incapable of founding a plea of diminished responsibility.²¹⁴ In essence, the defendant's voluntary consumption of alcohol at T1 was coalesced with the external element of the offence at the T2 stage, and any evidence of involuntariness in the supervening period was considered irrelevant in terms of attributional fault liability, unless the defence could establish that the defendant had suffered brain damage as a result of the condition.

The question of whether the defendant "did not or could not resist his impulse" was considered irrelevant where the first drink of the day had been voluntary.²¹⁵ The chemically dependent offender attributionally either lacked the capacity to resist the urge to drink or was responsible for his conduct and should be held accountable.²¹⁶ The judiciary's treatment of chemically dependent offenders could be likened to distinguishing between an alcoholic who does not have the money to purchase alcohol and the alcoholic who has a bottle of whiskey in the kitchen.²¹⁷ By the time the first has acquired the means to purchase alcohol he may be suffering from withdrawal, in which case, his behaviour is ostensibly involuntary and the diminished responsibility defence would be available. In the second instance, the defendant may have voluntarily consumed the alcohol in a bid to delay or prevent the onset of withdrawal symptoms and use of the partial defence would be prohibited.²¹⁸ A bizarre process of temporal individuation resulted, whereby the mitigating doctrine would be unavailable to the defendant who consumed intoxicants in the supervening period between the initial decision to ingest alcohol and withdrawal occurrence. The idea that every drink consumed by the

213. *R v Tandy*, [1989] 1 W.L.R. 350 (CA).

214. "We recognise that cases may arise hereafter where the accused proves such a craving for drink or drugs as to produce in itself an abnormality of mind but that is not proved in this case. The appellant did not give evidence and we do not see how self-induced intoxication can of itself produce an abnormality of mind due to inherent causes." *R v Fenton*, [1975] 61 Cr. App. R. 261. See also *R v Wood*, [2008] EWCA (Crim) 1305; [2008] 2 Cr. App. R. 34, 507 [23]; *R v James Stewart*, [2009] EWCA (Crim) 593; [2009] 2 Cr. App. R. 30, 500 [26] and [29].

215. Andrew Ashworth, *Diminished Responsibility: Defendant Diagnosed as Suffering from Alcohol Dependency Syndrome but Having Sustained no Brain Damage as a Result*, CRIM. L.R. 2008, 976, 978.

216. Jonathan Goodliffe, *R v Tandy and the Concept of Alcoholism as a Disease*, 53 MOD. L. REV. 809, 809-14 (1990).

217. Bob Sullivan, *Intoxicants and Diminished Responsibility*, CRIM. L.R. 1994, 156.

218. *Id.*

chronic alcoholic had to be involuntary was antithetical to psychiatric understanding of the disease:²¹⁹

Very few, if any alcoholics will be permanently in a condition where the immediate consumption of alcohol is required to prevent or assuage the symptoms of withdrawal from alcohol. Routinely alcoholics will consume alcohol before withdrawal symptoms arise or become distressing.²²⁰

The court's pre-eminent focus on the behavioural aspects of alcohol dependence syndrome,²²¹ in the absence of a contextual evaluation of the other symptoms and mental processes of the disease,²²² fundamentally undermined the rationale underpinning the partial defence by failing to recognise that a complete destruction of the defendant's free will was not required for his liability to have been substantially impaired.²²³

Judicial recognition of this failure has resulted in a more contextualised *dépeçage* approach in this arena, which requires jurors to focus on the defendant's mental abnormality and ignore the effects of any alcohol voluntarily consumed. The House of Lords²²⁴ in *Dietschmann*²²⁵ advocated that jurors should be directed to focus on the underlying abnormality rather than the intoxication *per se*. Lord Hutton identified that the issue is not whether the defendant would have carried out the killing in the absence of the intoxication, but whether, if he did kill, he killed under diminished responsibility. As a result, the defendant's voluntary consumption of alcohol at the T1 stage will not preclude the availability of diminished responsibility, where the defence is able to establish that the alcohol dependence syndrome substantially impaired the defendant's responsibility for murder at the T2 stage. Potentiate liability principles have constrained impact in abjuring "partial" but not full responsibility on the commission of the *actus reus* at the T2 stage of individuation. Reviewing *Dietschmann*, the appellate court in *Wood*²²⁶

219. Reed & Wake, *supra* note 15, at 183-206.

220. Sullivan, *supra* note 217, at 156.

221. Namely, whether the defendant was capable of resisting the impulse to drink.

222. See Tolmie, *supra* note 116, at 668-709 (receiving approval in *R v Wood*, [2008] EWCA (Crim) 1305 [35]). See also LAW COMMISSION, INSANITY AND AUTOMATISM, SUPPLEMENTARY MATERIAL TO THE SCOPING PAPER, *supra* note 19, at ¶ 2.58 (explaining the different models of alcoholism and alcohol dependency syndrome).

223. RONNIE MACKAY, MENTAL CONDITION DEFENCES IN CRIMINAL LAW 8 (Oxford Univ. Press 1995).

224. See generally *The Supreme Court*, JUDICIARY OF ENGLAND AND WALES, <http://www.judiciary.gov.uk/about-the-judiciary/introduction-to-justice-system/the-supreme-court.htm> (last visited Jan. 27, 2014) (showing that the House of Lords is now the Supreme Court).

225. *R v. Dietschmann*, [2003] UKHL 10, [2003] 1 A.C. 1209.

226. *Wood*, [2008] EWCA (Crim) 1305.

subsequently considered that in future cases fact-finders would be required to “focus exclusively on the effect of alcohol consumed by the defendant as a direct result of his illness or disease and ignore the effect of any alcohol consumed voluntarily.”²²⁷ It was no longer the case that the repeated insult from the intoxicants had to result in brain damage, as in the U.S., or alternatively, that every drink consumed on the fatal day was involuntary before the syndrome would be regarded a relevant factor in terms of potentiate liability and attributional criminal responsibility. The decision in *Wood* represented a significant relaxation of the Court of Appeal’s ostensibly “phenomenological, forward looking [and] free will oriented”²²⁸ view of chemically dependent offenders. Nevertheless, the test articulated in *Wood* which required “the jury to ‘separate out’ . . . each and every drink”²²⁹ in order to determine “the degree of voluntariness and involuntariness” in the defendant’s drinking²³⁰ represented a judicial reluctance to deviate from traditional “intentionalist” theory.²³¹ In practice, it will be almost impossible for jurors to distinguish between voluntary and involuntary intoxication at the T1 stage where the chronic alcoholic is concerned. A rigid analytical divide between voluntariness and involuntariness in this arena is arguably a misnomer and ought not to be the principal focus in cases of this context. The *dépeçage* approach to fault attribution in cases involving the chronic alcoholic reflects the view that the defendant’s responsibility is lower than that of the reasonable and sober person, regardless of whether the first drink of the day was consumed voluntarily.

Notwithstanding the inherent difficulties associated with requiring jurors to separate out each drink of the day, the effect of the ruling in *Wood* is that alcohol dependency syndrome has the potential to reduce murder to manslaughter in two situations. The first essentially mirrors section 2.08(1) of the *Model Penal Code* and operates where the “effect of the intoxication is so extreme” that the prosecution is unable to prove the requisite intention for murder—a decision for fact-finders as part of “folk wisdom” on the effects of voluntary intoxication.²³² The second arises where, again the necessary intention for murder is proven, notwithstanding the consumption of alcohol, but partial exculpation applies on the basis of diminished responsibility.²³³ In this regard, the

227. *Id.* at [41].

228. KELMAN, *supra* note 114, at 86. This emphasises “the indeterminacy of action and, correlatively, the ethical responsibilities of actors.” *Id.*

229. Stewart, [2009] EWCA (Crim) 593 at [28].

230. Ashworth, *supra* note 215, at 978.

231. See the discussion in part III.

232. Stewart, [2009] EWCA (Crim) 593 at [29]. *Model Penal Code* section 2.08(1), as noted, applies to offences requiring knowledge or purpose.

233. Stewart, [2009] EWCA (Crim) 593 at [29].

diminished responsibility defence represents an appropriate *via media* through which the alcohol dependent defendant's lower level of culpability can be assessed. It identifies that in order to appropriately attribute fault the various gradations of mental disorder identified in medical and behavioural sciences must be recognised, and recent reform to the diminished responsibility plea under the Coroners and Justice Act 2009 provides an appropriate template for beneficial harmonisation within the U.S.

VI. RECENT DEVELOPMENTS: A NEW INTERNATIONAL CLASSIFICATORY SYSTEM

The recently revised diminished responsibility plea provides an appropriate aperture through which to consider the chronic alcoholic's criminal responsibility in murder cases, and it is suggested herein that an equivalent form of mitigation is considered in the U.S. To raise the revised plea successfully the defendant must now prove, on the balance of probabilities,²³⁴ that at the time of the killing he was suffering from an "abnormality of mental functioning" arising from a "recognised medical condition."²³⁵ Jurors will be required to consider two issues in order for the partial defence to be satisfied. First, fact-finders will have to assess whether the recognised medical condition substantially impairs the defendant's ability to (a) understand the nature of the defendant's conduct; (b) form a rational judgement; or (c) exercise self-control.²³⁶ Secondly, jurors will be required to determine whether the mental abnormality provides an explanation for the killing.²³⁷ An explanation will be provided "if it causes, or is a significant contributory factor in causing" the person to carry out that conduct.²³⁸

The revised plea is demonstrative of a discernible move

234. Placing the burden of proof on the defendant is compatible with the European Convention on Human Rights, Art. 6(2); *R v. Lambert, Ali, & Jordan*, [2000] EWCA (Crim) 3542, [2002] Q.B. 1112. *See also* *Lilburn v. HM Advocate*, [2011] HCJAC 41 [11] (holding that the burden of establishing the diminished responsibility plea rests on the defendant). *See also* *R v. Foye*, [2013] EWCA (Crim) 475; Andrew Ashworth, *R v. Foye (Lee Robert): diminished responsibility - Homicide Act 1957 s2(2)*, CRIM. L.R., 2013, 839. *But see* Andrew Ashworth, *Insanity and Automatism: A Discussion Paper*, CRIM L.R. 2013, 787 (questioning the sustainability of the reverse burden in diminished responsibility cases should the Law Commission's recommendations in relation to the "Recognised Medical Condition" defence be taken forward).

235. Coroners and Justice Act, 2009, c.25, § 52(1)(a).

236. *Id.* § 52(1A).

237. *Id.* § 52(1B).

238. Ronnie Mackay, *The Coroners and Justice Act 2009 – Partial Defences to Murder (2) The New Diminished Responsibility Plea*, 4 CRIM. L.R. 2010, 290, 292. *See generally id.* at 297-300 (discussing this element of the concessionary defence).

towards medicalisation of the concessionary defence²³⁹ and the Royal College of Psychiatrists rightly suggested that the “recognised medical condition” requirement would encourage experts to confine their diagnosis to those accepted in the international classificatory systems of mental disorders (WHO ICD-10 and AMA DSM).²⁴⁰ The first²⁴¹ appellate court case to apply the “recognised medical condition” requirement has very recently highlighted that this definitional change may have more significant consequences than initially thought.²⁴² In *Dowds*,²⁴³ the appellant was a 49 year-old college lecturer, with no previous convictions, who stabbed his partner to death after having consumed vast quantities of alcohol. According to his evidence, both were habitual binge drinkers and there had been a long history of violence between them, mostly initiated by her, and usually when one or both had been drinking. The defendant claimed to have no recollection of the events, which led to the victim’s death, but accepted that he must have been responsible for her wounds. Dowds was convicted of murder after the jury rejected the loss of control defence²⁴⁴ and concluded that Dowds had intended to cause serious bodily harm. At the outset of the trial, Wait J. ruled that the *Majewski* principle was determinative, and voluntary intoxication was only relevant to specific intent offences, and operated as a denial of the requisite *mens rea*, and accordingly transient acute intoxication was insufficient to raise the partial defence of diminished responsibility.²⁴⁵

239. Louise Kinnefick, *Introducing a New Diminished Responsibility Defence for England and Wales*, 74 MOD. L. REV. 750, 757, (2011).

240. LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE, *supra* note 134, at ¶ 5.114. *See also* Kinnefick, *supra* note 239, at 757 (discussing that psychiatric classification systems would prove more important in establishing “recognised medical conditions”, making it a requirement there exist a medical basis for diagnosis). *See also* R v. Bunch, [2013] EWCA (Crim) 2498.

241. *See* Nicola Wake, *Psychiatry and the New Diminished Responsibility Plea: Uneasy Bedfellows?*, J. CRIM. L. 76 (2) 122-29 (2012) (noting that the instant case (*R v. Brown*) was the first which required the court to assess diminished responsibility in new terms, meaning that a revised plea would require a “recognised medical condition”); *See also* R v Brown (Robert), [2011] EWCA (Crim) 2796, [23] (determining that one of the reasons for this amendment is to provide a “greater equilibrium” between law and medicine, which is why the level of mental ability must arise from a recognised medical condition).

242. Kinnefick, *supra* note 239, at 757.

243. Dowds, [2012] EWCA (Crim) at [2].

244. Coroners and Justice Act, 2009, §§ 54-55.

245. This sits in contradistinction to the approach adopted in the seventeenth and eighteenth century where defendants would raise informal defences / pleas on the basis of diminished responsibility arising from acute intoxication or a plea linking the intoxication with Insanity. Dana Rabin, *Drunkenness and Responsibility for Crime*, J. BRITISH STUDIES 44, 457-477 (2005). The close connection between intoxication and insanity suggests that

The defendant appealed, arguing that the amendments made to section 2 of the Homicide Act 1957,²⁴⁶ within the purview of section 52 of the Coroners and Justice Act 2009, meant that acute voluntary intoxication²⁴⁷ may give rise to the concessionary defence and thus reduce a murder conviction to one of voluntary manslaughter. The defence's argument was that section 2(1) of the 1957 Act, as amended,²⁴⁸ requires that at the time of the killing the defendant must have been suffering from an "abnormality of mental functioning" arising from a "recognised medical condition". The ICD-10 contains at F10.0, the condition of "Acute Intoxication".²⁴⁹ Acute intoxication is, therefore, a "recognised medical condition" and thus presumptively his intoxication involved an impairment of mental functioning, which may have affected his ability to form a rational judgement and / or exercise self-control.²⁵⁰ Accordingly, Dowds asserted that the newly formulated defence should have been left to the jury.

In policy terms, it is "unremarkable"²⁵¹ that the English Court of Appeal emphatically rejected the appeal on the basis that voluntary acute intoxication, whether from alcohol or an alternative substance, is not capable of founding diminished responsibility,²⁵² since the defendant's argument runs counter to the established *Majewski*²⁵³ principle, as outlined in Part I, that voluntary intoxication is not a defence, save upon the limited question of whether a "specific intent" has been formed.²⁵⁴ Lord

the "criminal law employed a minimally differentiated conceptualisation of the abnormal mental states that might exculpate an individual." LOUGHNAN, *supra* note 10, at 177.

246. Coroners and Justice Act, 2009, § 52.

247. For the purposes of the partial defence, it was not contended that Dowds was an alcoholic or clinically dependent on drink. He was a heavy but elective drinker. He held down a responsible occupation, which required him to be alert and clear-thinking. Dowds, [2012] EWCA (Crim) 281.

248. As amended by the Coroners and Justice Act, 2009, § 52.

249. Acute intoxication is defined by the World Health Organisation as "[a] transient condition following the administration of alcohol or other psychoactive substance, resulting in disturbances in level of consciousness, cognition, perception, affect or behaviour, or other psychophysiological functions and responses." WORLD HEALTH ORGANISATION, MANAGEMENT OF SUBSTANCE ABUSE, available at http://www.who.int/substance_abuse/terminology/acute_intox/en/index.html.

250. [2012] EWCA (Crim) 281 [33].

251. Rudi Fortson, *R v Dowds*, [2012] EWCA (Crim) 281, available at <http://www.rudifortson4law.co.uk/legaldevelopments12.php> (accessed on Jan. 27, 2014).

252. This is in line with the position prior to the 2009 Act reforms. *R v Fenton*, (1975) 61 Cr App R 261; *Dietschmann*, [2003] UKHL 10; *R v Wood*, [2008] EWCA 1305; *Stewart*, [2009] EWCA (Crim) 593.

253. [1977] AC 443. See generally Andrew Simester, *supra* note 42, at 3-14 (arguing that the intoxication doctrine should not be seen as a defence, but rather as a doctrine which imposes constructive liability on the actor).

254. Lord Justice Hughes considered that "it would have been a strange

Justice Hughes, delivering the unanimous judgment of the appellate court, was of the view that if Parliament intended to alter the law on voluntary intoxication it would undoubtedly have made this intention explicit,²⁵⁵ and it was not possible to infer such an intention from the adoption in the new formulation of the expression “recognised medical condition.”²⁵⁶ Their Lordships were careful to outline that the ruling applies only in the context of voluntary intoxication *simpliciter* which is uncomplicated by alcoholism or dependence.²⁵⁷ In this regard, the earlier Court of Appeal decisions in *Wood* and *Stewart* have been impliedly reaffirmed, and alcohol dependence syndrome will continue to be relevant in assessing a defendant’s culpability for murder in English Law under the reformulated plea. As noted, the voluntary consumption of alcohol at T1 will not preclude the availability of the partial defence where the defendant suffers from alcohol dependence syndrome. In cases of this context, the focus should be on whether the defendant’s abnormality “substantially impaired”²⁵⁸ the defendant’s ability to understand the nature of his conduct; form a rational judgment; or to exercise self-control.²⁵⁹ This *dépeçage* approach to criminal liability provides an individuated response through which the alcoholic defendant’s culpability can be assessed in light of the syndrome. It is not the identification that alcohol dependence is a medically recognised condition *per se*, but it is the fact that the severity of the syndrome

result if the merciful relaxation of a strict rule of law had ended, without any Parliamentary intervention, by whittling it away to such an extent that the more drunk a man became, provided it stopped short of making him insane, the better chance he had of an acquittal . . .” *Dowds*, [2012] EWCA (Crim) at [17].

255. “The exception which prevents a defendant from relying on his voluntary intoxication, save upon the limited question of whether a ‘specific intent’ has been formed, is well entrenched and formed the unspoken backdrop for the new statutory formula. There has been no hint of any dissatisfaction with that rule of law. If Parliament had meant to alter it, or depart from it, it would undoubtedly have made its intention explicit.” *Asmelash*, [2013] EWCA (Crim) at [22] (The Lord Chief Justice of England and Wales citing LJ Hughes’s comments in *Dowds* with approval.).

256. *Dowds*, [2012] EWCA (Crim) at [35].

257. *Id.* at [34].

258. *Ramchurn*, [2010] EWCA (Crim) 194; *see also* Wake, *supra* note 208, at 15 (stating that the term substantial impairment will continue to be used in courts); *R v Lloyd* (Derek William), [1967] 1 Q.B. 175 (holding that substantial impairment being defined as something between trivial and total was correct).

259. *Dowds*, [2012] EWCA (Crim) at [11]. *See also* *Dietschmann*, [2003] UKHL 10 (discussing where there is a mental abnormality and intoxication, the Court said the jury must “ignore the effects of intoxication and to ask whether, leaving out the drink, the defendant’s other condition(s) of mental abnormality substantially impaired his responsibility for the killing”); *Wood*, [2008] EWCA (Crim) at [16] (stating that alcohol dependency syndrome produces changes in the brain which would make the actor incapable of self control or sound judgment, which could be argued as an abnormality).

may, in limited circumstances, have a bearing on the defendant's criminal responsibility that justifies the reduction from murder to manslaughter, and potentiate liability applies at T1 individuation as an abjuration of responsibility, albeit partial. This template ought to also apply in the U.S. in terms of a more empathetic approach to the intoxicated offender and mental condition defence treatment.

The approach their Lordships adopted in relation to acute intoxication in *Dowds* has been extended to cover the concessionary loss of control defence in English law. The partial defence applies where the defendant kills subject to a loss of control; the loss of control must be attributable to at least one of two qualifying triggers. The first qualifying trigger is satisfied by a thing said or things done or said (or both), which constituted circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged.²⁶⁰ The second qualifying trigger requires the defendant to fear serious violence from the victim against the defendant or another identified person.²⁶¹ The defendant's charge will be reduced from murder to voluntary manslaughter where the jury concludes that a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the same circumstances, might have acted in the same or a similar way to the defendant.²⁶² In this context, all of the defendant's circumstances will be considered except those whose only relevance is that they bear on the defendant's general capacity for tolerance and self-restraint.²⁶³

In the recent case of *Asmelash*,²⁶⁴ the Court of Appeal assessed whether the voluntary consumption of alcohol could fall within the "defendant's circumstances" for the purposes of the partial defence of loss of self-control.²⁶⁵ The Lord Chief Justice for

260. The "seriously wronged" trigger. The Coroners and Justice Act, 2009, §§ 54(1)(b) and 55(3), (4)(b).

261. The "fear" trigger. The Coroners and Justice Act, 2009, §§ 54(1)(b) and 55(3), (4)(a)-(b), (6)(c)).

262. *Id.* § 54(1)(c).

263. *Id.* § 54(3).

264. [2013] EWCA Crim 157.

265. *Id.* at [21]. The Crown Court Bench Book stated:

D's circumstances would include the consumption of alcohol. The jury will no longer be directed that a reasonable man is a sober man. The jury will need to decide whether a man in these circumstances (including the consumption of drink) but nevertheless possessing a normal degree of tolerance and self-restraint might act as D did. It is suggested that the jury may still be directed that D's conduct is to be judged by the standard of the person who retained a normal degree of tolerance and self-restraint even if that person had consumed alcohol as D did.

[2013] EWCA Crim at [17]. This suggestion was criticised as ignoring the wording of the loss of control defence. *Id.* at [20]. See also David Ormerod's

England and Wales cited with approval the initial trial judge's direction which required jurors to ignore the defendant's intoxication and apply *Majewski* standardisations:

Are you sure that a person of [defendant's] sex and age with a normal degree of tolerance and self restraint and in the same circumstances, but unaffected by alcohol, would not have reacted in the same or similar way?²⁶⁶

The impact is that voluntary intoxication at the T1 stage will not preclude the availability of the loss of control defence at T2; the defendant's conduct is assessed according to the standards of the ordinary sober person. This approach is clearly aligned with the *Law Commission's* recommendation that atypical mental states, such as intoxication and irritability, should be omitted from consideration on the basis that they constitute factors which bear on the defendant's general capacity to exercise adequate self-control.²⁶⁷ The court was persuaded by the "compelling reasoning"²⁶⁸ in *Dowds* and accepted that the term "unaffected by alcohol" should be implied into the loss of control defence, otherwise "the floodgates would be open for every violent drunk would say 'I must be judged against the standards of other violently disposed drunken people even though I may be like a lamb when I am sober.'"²⁶⁹ In practical terms, it was considered illogical to apply a discrete rule to the loss of control defence, given that in many cases the partial defences are raised simultaneously.²⁷⁰ Importantly, their Lordships noted that a gravitational approach would apply where the defendant suffers from alcohol dependence syndrome and is ruthlessly taunted regarding that condition (to the extent that it amounts to a qualifying trigger) in which case the syndrome would constitute part of the circumstances for consideration.²⁷¹ In this regard, the

comments:

Section 54(3) only appears to exclude a circumstance on which D seeks to rely if its *sole* relevance is to diminish D's self-restraint. This could open the opportunity for D to adduce all sorts of evidence. In particular, D might claim that his intake of alcohol or other intoxicants was a relevant circumstance and that the intoxication did not simply diminish his self-restraint, but also had some other relevance—e.g. that it caused a relevant mistake. This may amount to no more than a plea of lack of intent on grounds of intoxication, but it will make directing the jury more complex.

DAVID ORMEROD, SMITH AND HOGAN'S CRIMINAL LAW 526 (Oxford Univ. Press 2011).

266. *Asmelash*, [2013] EWCA Crim at [15] (emphasis added).

267. LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE, *supra* note 134. See also *R v. Dawes, Hatter and Bowyer*, [2013] EWCA (Crim) 322.

268. *Asmelash*, [2013] EWCA Crim at [24].

269. *Id.* at [15].

270. *Id.* at [24].

271. *Id.* at [25].

ruling suggests that alcohol dependence syndrome would be relevant at the T2 stage of individuation, notwithstanding the voluntary consumption of alcohol at T1, in that jurors would be required to consider whether an ordinary person “of the defendant’s sex and age with a normal degree of tolerance and self-restraint and suffering from alcohol dependence syndrome would have acted in the same or a similar way.” Despite the obvious problems associated with requiring jurors to answer hypothetical questions of this nature, this nuanced approach reflects the general consensus in English law that alcohol dependence syndrome potentially impacts upon the defendant’s level of criminal responsibility. In this regard, cases such as *Asmelash* and *Dowds* reaffirm that a *dépeçage* approach ought to be adopted to the chronic alcoholic in order to engage in a fair and valid assessment of the defendant’s culpability.

Further grist to the mill pervades the outcome in *Dowds* by their Lordships’ recognition that Parliament did not formally make reference to the ICD-10 and DSM in the Coroners and Justice Act 2009.²⁷² This is attributed to the the disparity between the requirements for an impairment to be recognised by the international classificatory systems and the level mandated in law.²⁷³ Accordingly, the presence of a “recognised medical condition” is a necessary, but not always a sufficient condition to raise the issue of diminished responsibility.²⁷⁴ The effect is to imply that in certain cases the defendant will be required to prove something beyond a “recognised medical condition” before he may satisfy that aspect of the partial defence.²⁷⁵ Although the international classificatory systems were not explicitly written into the statutory formula, the rationale for including the “recognised medical condition” requirement was to ensure a greater balance between the law and psychiatry.²⁷⁶ The idea that the courts will be required to determine which recognised medical conditions are valid for the purposes of the partial defence is inimical to this aim.²⁷⁷

Nevertheless, it is unsurprising that this juridical bar has been attached to the defence, in light of the array of “disorders” potentially applicable (for example, “unhappiness”,²⁷⁸ “irritability

272. [2012] UKPC 15 [35].

273. *Id.* at [30].

274. *Id.* at [40].

275. However, the Court of Appeal provided no further guidance in relation to this tacit requirement. See generally Nicola Wake, *Diminished Responsibility: Raising the Bar?*, (2012) JOURNAL OF CRIMINAL LAW 76 (3) 193-97.

276. *R v Brown* (Robert), [2011] EWCA Crim 2796 [23]; LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE, *supra* note 134, at ¶ 5.114.

277. Wake, *supra* note 275, at 193-97.

278. *Dowds*, [2012] UKPC at [31]. See also World Health Organisation, ICD-10 (R45.2), available at:

and anger”,²⁷⁹ “suspiciousness and marked evasiveness”,²⁸⁰ “pyromania”,²⁸¹ “paedophilia”,²⁸² “sado-masochism”,²⁸³ “kleptomania”,²⁸⁴ “exhibitionism”,²⁸⁵ “sexual sadism”²⁸⁶ and “intermittent explosive disorder”²⁸⁷) which, although recognised by the international classificatory systems, appear to be incompatible with criminal law principles of exculpation. The ruling implies that the aforementioned conditions will be insufficient to satisfy the “abnormality of mental functioning” requisite, despite existing as “recognised medical conditions”. The Court of Appeal’s reservations regarding conditions like “intermittent explosive disorder”, or *instinctual monomanias*, which manifests itself in impulsive acts of aggression, reflects the general public policy conceptualisation of aggressive and combative behaviour as inculpatory conduct, despite the condition originally being denoted as a form of partial insanity. In this regard, *dépeçage* selectivity is adopted to individuated concerns in order to maintain a balance between acknowledging that a defendant’s mental disorder may have an impact on his legal responsibility, whilst protecting the public.

Alcohol dependence syndrome, pre-and-post the Coroners and Justice Act 2009, has been jurisprudentially determined to constitute a valid basis upon which to claim the partial exemption of diminished responsibility in English law. Nevertheless, it is likely that the divergent approaches adopted in terms of categorising mental and behavioural disorders under each of the international classificatory systems will present problems in future cases involving substance related disorders. The ICD is designed to be a comprehensive guide to all diseases and related health issues and is used by a vast array of health professionals in a variety of countries of different sizes, cultures and resources. In contrast, the remit of the DSM is much narrower, focusing upon psychiatry and clinical psychology in the U.S.²⁸⁸ The result is that

<http://apps.who.int/classifications/icd10/browse/2010/en> (last accessed on Jan. 27, 2014).

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* See also AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 569 (4th ed. 1994).

286. *Id.* at 573.

287. *Id.* at 663-67.

288. Pathological intoxication manifests itself through outbursts of “irrational, combative, destructive behaviour.” R Kendell, *The relationship between DSM-IV and ICD-10*, (1991) J. ABNORMAL PSYCHOLOGY, 100, 297–301, 299–300. “It is important to note that the definition of mental disorder included in the DSM-5 was developed to meet the needs of clinicians, public health officials, and research investigators rather than all of the technical

variations between the criteria-set wording in the DSM and the WHO have the potential to lead to equivalent conditions “being defined differently” and this “undermines the credibility of the entire diagnostic process.”²⁸⁹ This difficulty is illustrated by conceptual differences in the diagnostic criteria for patients whose substance use does not meet the criteria for substance dependence ICD-10.²⁹⁰ The ICD-10 criteria-set for “harmful use”²⁹¹ focuses on the detrimental effect substance use has on the patient’s health, for example, episodes of depressive disorder secondary to alcohol consumption. In contrast, the criteria for “Substance-Induced Disorders”²⁹² under the DSM-5 emphasises the “problematic behavioral and psychological changes associated with intoxication.”²⁹³ The focus of the ICD is on the biological deficit²⁹⁴ whereas the DSM considers the abnormal behaviour of the individual.²⁹⁵ In a practical context, such disparities may result in disputes between the prosecution and the defence in terms of which criteria-set to adopt. In light of *Dowds*, the judiciary might advocate that harmful use per se is incapable of satisfying the diminished responsibility plea. Nevertheless, distinguishing between harmful use/ substance abuse for the purposes of the diminished responsibility plea may be rendered difficult in light of the DSM-5’s re-categorisation of abuse and dependence into a single disorder of graded clinical severity.²⁹⁶

Amendments to the international classificatory systems in the DSM-V and forthcoming ICD-11 manuals are designed to align core versions of the ICD and DSM manuals by ensuring that

needs of the courts and legal professionals.” AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

289. Michael B. First, *Harmonisation of ICD-11 and DSM-V: Opportunities and Challenges*, 195 BRIT. J. OF PSYCHOL. 382 (2009).

290. *Id.* at 382-90.

291. WHO, *ICD-10*, 69, available at <http://www.who.int/classifications/icd/en/bluebook.pdf> (defining “harmful use” as “[a] pattern of psychoactive substance use that is causing damage to health . . . e.g. episodes of depressive disorder secondary to heavy consumption of alcohol”).

292. (The American Psychiatric Association category of “Substance Induced Disorders” includes intoxication, withdrawal and other substance induced mental disorders (e.g. substance induced psychotic disorder and substance induced depressive disorder). AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

293. First, *supra* note 289, at 382-90. AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

294. Seymour L. Halleck, *Responsibility and Excuse in Medicine and the Law: A Utilitarian Perspective*, L. AND CONTEMP. PROBS. 127, 133 (1986).

295. *Id.* at 133, 136.

296. See Reed & Wake, *supra* note 15, at 183, 191 (discussing the combination of both disorders as well as a graded system of determining clinical severity). AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 485-87 (5th ed. 2013).

category names, glossary descriptions and criteria are identical.²⁹⁷ At present “trivial” differences in the wording of criteria-sets and the threshold number of symptoms for the diagnosis of substance dependence often result in substantial differences in diagnoses.²⁹⁸ Medical experts have the option of which diagnostic criteria to adopt when assessing a defendant’s condition in cases like *Wood*, and this renders it more likely that dissonance will operate on the extent to which that “recognised medical condition” is capable of constituting an “abnormality of mental functioning” for the purposes of the revised plea.²⁹⁹ For example, the ICD-10 and the criteria requires a minimum of three symptoms from a list of six for diagnosis whereas the DSM-V may be satisfied by evidence of two symptoms from eleven indicators.³⁰⁰ It is clear that disparate diagnostic methods contribute to the “uneasy fit between theoretical views that urge the predominant moral significance of activities on the one hand, and the [criminal law’s] everyday practices of assigning blame and granting excuses on the other.”³⁰¹ The mental gymnastics that jurors engage in when determining whether the defendant’s responsibility is “substantially impaired” will invariably be exacerbated by the conflicting testimony provided by medical experts.³⁰² The U.S. courts have heavily criticised doctrines which appear to divide “decision-making authority” between fact-finders and expert witnesses.³⁰³ However, suggestions that the use of medical testimony should be prohibited

297. INTERNATIONAL ADVISORY GROUP FOR THE REVISION OF ICD–10 MENTAL AND BEHAVIOURAL DISORDERS, SUMMARY REPORT OF THE 3RD MEETING OF THE INTERNATIONAL ADVISORY GROUP FOR THE REVISION OF ICD–10 MENTAL AND BEHAVIOURAL DISORDERS (World Health Organization 2008), *available at* http://www.who.int/mental_health/evidence/icd_summary_report_march_2008.pdf (last accessed on Jan. 27, 2014). See *generally*, THE WORLD HEALTH ORGANISATION, ICD-11 BETA DRAFT *available at*: <<http://apps.who.int/classifications/icd11/browse/l-m/en>> (last accessed, Feb 20th, 2014).

298. First, *supra* note 293, at 384 (discussing how modern systems which are “intended to create a shared language” have the potential to create “epistemic blinders that impede progress toward valid diagnoses”); SUMMARY REPORT OF THE 3RD MEETING OF THE INTERNATIONAL ADVISORY GROUP FOR THE REVISION OF ICD–10 MENTAL AND BEHAVIOURAL DISORDERS, *supra* note 297, at 155.

299. For discussion on the problems associated with conflicting psychiatric testimony in diminished responsibility cases, see Nicola Wake, *supra* note 241, at 122-29. See also *R v Brown (Robert)*, [2011] EWCA Crim 2796 [23].

300. First, *supra* note 293, at 382-90. See also Reed & Wake, *supra* note 15, at 183-206. AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 490-91 (5th ed. 2013).

301. Boldt, *supra* note 102, at 2252.

302. Matt Gibson, *Intoxicants and Diminished Responsibility: The Impact of the Coroners and Justice Act 2009*, CRIM. L.R. 2011, 909-924, 920. *R v. Bunch*, [2013] EWCA (Crim) 2498.

303. *Betha v. United States*, 365 A.2d 64, 89 (D.C. Cir. 1976).

in order to protect the public profoundly undercuts the “moral credibility”³⁰⁴ of the criminal law: “[p]roportionality between blameworthiness and liability is sacrificed [where] potentially erroneous convictions [are permitted] in exchange for an increased ease of prosecution.”³⁰⁵ As identified in the DSM manual, many of these difficulties stem from the importation of the DSM and ICD-10 into settings for which they were not designed:

The use of the DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.³⁰⁶

In recognising that “one size does not fit all”³⁰⁷ the WHO published three specialised versions of the ICD-10 for use in primary care,³⁰⁸ clinical practice,³⁰⁹ epidemiological and clinical studies,³¹⁰ and intends to introduce similar documents to run alongside the ICD-11. A specialised approach needs to be adopted *vis-à-vis* the diminished responsibility plea, and a tabulated

304. Paul H Robinson, *supra* note 176, at 299. *See also* Paul H Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (discussing why the justice system’s shift in focus from punishment of past crimes to preventative detention is a poor move); Paul H Robinson, Geoff Goodwin & Michael Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010) (explaining how deviation from the principles of justice undermines the moral credibility of the justice system); PAUL H ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 109-33, 175-212 (Oxford Univ. Press 2008) (discussing incapacitation and the utility of empirical desert as a distributive principle).

305. ROBINSON, *supra* note 26, at 66. *See also*, *R v Cannings*, [2004] 1 All ER 725; Bernadette McSherry, *Expert Testimony and the Effects of Mental Impairment: Reviewing the Ultimate Issue Rule*, 24 INT’L J. L. & PSYCHIATRY 13 (2001).

306. AM. PSYCH. ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 25 (5th ed. 2013). *See generally* Dowds, [2012] 1 W.L.R. at [30].

307. Geoffrey M Reed, *Toward ICD-11: Improving the Clinical Utility of WHO’s International Classification of Mental Disorders*, 41 PROF. PSYCHOL. RES. AND PRAC. 457, 461 (2010).

308. WORLD HEALTH ORGANIZATION, *DIAGNOSIS AND MANAGEMENT OF COMMON MENTAL DISORDERS IN PRIMARY CARE* (1998), *available at* http://whqlibdoc.who.int/hq/1998/WHO_MSA_MNHIEAC_98.1.pdf (last accessed Jan. 27, 2014).

309. WORLD HEALTH ORGANIZATION, *CLINICAL DESCRIPTIONS AND DIAGNOSTIC GUIDELINES* (1992), *available at* <http://www.who.int/classifications/icd/en/bluebook.pdf> (last accessed Jan. 27, 2014).

310. WORLD HEALTH ORGANIZATION, *DIAGNOSTIC CRITERIA FOR RESEARCH* (1993), *available at* <http://www.who.int/classifications/icd/en/GRNBOOK.pdf> (last accessed Jan. 27, 2014).

regulatory approach is needed to beneficially promulgate the questioning of “recognised medical condition[s]” for the purposes of a re-standardised partial defence on both sides of the Atlantic.³¹¹

There is a “world of difference” between cases of homicide where the defendant killed whilst voluntarily intoxicated and killings committed under the influence of alcohol dependency syndrome,³¹² and, as such, the focus in cases involving substance use disorders should be upon the defendant’s mental abnormality, rather than on conceptualisations of voluntariness. Despite the difficulties associated with delimiting the diminished responsibility plea, it provides a viable route of partial exculpation where the defendant’s responsibility is reduced, notwithstanding the fact that he may have been acting voluntarily. The fact that the defendant’s first drink may have been voluntary at T1 does not preclude the availability of the partial defence at T2, providing all elements of the concessionary defence are satisfied. This *dépeçage* approach to alcoholic defendants who kill avoids the rigid voluntary / involuntary categorisation and permits the jury to assess whether the defendant’s culpability was affected by mental disorder in terms of potentiate liability: “if an offender’s liberty is to be infringed . . . it must be as a consequence of . . . wrongful conduct that is properly attributable to the will of the actor and not to some ‘disease’ . . .”³¹³

311. This could be achieved by the commission of a Working Group comprised of members of the judiciary, legal practitioners, psychiatrists, clinical psychiatrists and members of the World Health Organisation and American Psychiatric Association, with the aim of producing a Code of Practice akin to the specialised versions of the ICD. Rudi Fortson, *R v Dowds* [2012] EWCA Crim 281, available at <http://www.rudifortson4law.co.uk/legaldevelopments12.php> (last accessed Jan. 27, 2014). The Law Commission have recently indicated that the “recognised medical condition” requirement under section 2 of the Homicide Act 1957 (as amended by section 52 of the Coroners and Justice Act 2009) ought to have been statutorily qualified. The Commission’s recommendations for a new “recognised medical condition” defence which would replace the current insanity defence would only be available where the defendant suffers from a “qualifying” medical condition, and acute intoxication and personality disorders are to be specifically excluded for such purposes. LAW COMMISSION, DISCUSSION PAPER, INSANITY AND AUTOMATISM *supra* note 19.

312. LAW COMMISSION, PARTIAL DEFENCES TO MURDER, *supra* note 172, at ¶ 5.45 (Dr Keith Rix).

313. Richard C Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA L. REV. 2245, 2289 (1992). See also Barbara Hudson, *Punishing the Poor: a Critique of the Dominance of Legal Reasoning in Penal Policy and Practice*, in PENAL THEORY AND PRACTICE (Antony Duff et al., eds., 1994), 302.

VII. CONCLUSION

It is our contention that a new *via media* is urgently needed in Anglo-American standardisations applicable to the intoxicated offender, utilising *dépecage* selectivity to individuated concerns. A new schematic template, on a principled edifice, is required to properly reflect fair labelling and achieve doctrinal coherence. As such, it is necessary to re-examine potentiate liability linked to actual criminal responsibility across the spectra of intoxication imputations. The demands of substantive transparency and moral credibility determine that the quintessential inquiry as to “blameworthiness” in relation to any intoxicated offender should focus upon lack of individuated responsibility in terms of preventing fault and attributional liability. It is inapt to focus instead on cognitive states of imputed recklessness and thereby to amorphously construct a conviction on an imputed legalised fiction.

There must exist a moral legitimacy for inculcating the intoxicated “offender” who commits basic intent crimes without the prevalence of the designated offence-specific *mens rea* element at the time of the offence. It is provided by standardisation of potentiate liability for preventing fault. The principles herein stand as a corollary to acknowledged principles of supervening fault and “responsibility” attached to creation of a dangerous situation. Inculcated policy rationalisations are derived from abjuration of individual responsibility and consequentialist effect attached to lack of care as a moral agent determinative of inculcation, and not cognitive states of falsely imputed *mens rea*. Moral culpability should effectively apply in that an individual party must take responsibility for elective choices—drinking or taking drugs. The *éminence grise* of potentiate liability for intoxicated behaviour involves a standardisation of harm prevention as part of the legitimate factorisation of conduct criminalisation, and this coalesces with awareness creating inculpatory responsibilities.

Potentiate liability and preventing fault may be beneficially adapted to a number of different postulations engaging the intoxicated “offender” in *dépecage* normalisations. An individual actor who drinks to provide Dutch Courage to commit any designated offence, specific or basic, abjures responsibility to others and is morally culpable to an indefensible extent. In terms of temporal individuation of offence-definition nexus the prior fault awareness at T1 ought to be added to the unlawful commission of *actus reus* elements at T2 without delineation to inculcate the morally blameworthy agent of all crimes. The concatenation is that it is almost as if the individual actor is using himself as an innocent agent, but it is an agency disregarding the interests of others or risks attendant to culpable activity. The imputation is that attributional liability is morally legitimate if the defendant is aware that excessive drinking triggers in him a dangerous and

aggressive pattern of behaviour.

Potentiate liability and precluding fault principles are of supererogatory effect within the boundaries of pathological intoxication and separate treatment for therapeutic drug-taking. Criminal responsibility attaches only to a defendant who is morally culpable and who with awareness disregards the interests of others or risks attendant to harmful conduct. The term “recklessness” is used in a particularised context of risk-taking awareness and in a generalised sense, not requiring foresight of the *actus reus* of any particular crime as required in purposive criminal recklessness specificity. Instead, it is utilised to identify recklessness as moral culpability or otherwise, and via transmogrification of awareness of a risk that the actor will become aggressive or dangerous (at T1 stage).

It is our view that substantive doctrinal principles operate capriciously against destabilised “offenders” who have been involuntarily intoxicated. Potentiate liability is not invoked at the T1 stage of temporal individuation, and the morally blameless offender ought to be able to raise an inference for fact-finder determination that “but for” the disinhibition created involuntarily or without responsibility at T1 then no harmful effects at T2 would have been engendered. The burden should rest on a defendant to address lack of precluding fault in this regard. The focus on lack of potentiate liability and disregard for the interests of others at T1 creates an affirmative reverse burden defence of exceptional pathology attached to moral legitimacy in exculpating the radically destabilised “offender”.

A legalised fiction has been created in Anglo-American intoxication doctrine in terms of imputed liability for basic intent offences. This constructive liability is predicated not on criminal recklessness but criminal responsibility of a volitional agent, and the prior fault lies in voluntary intoxication. It is attributional culpability derived from potentiate liability at T1 temporal individuation, and applies irrespective of conscious advertence to the risk of ultimate harm. Fair labelling and doctrinal coherence require a specific offence detailing the inculpatory nature of precluding fault and potentiate liability, and a template prevails in German law standardisations.

The rejection of alcohol dependence syndrome as a bespoke “mental disease or defect” for the purposes of the insanity defence by the U.S. courts, has resulted in the condition being regarded as voluntary for the purposes of attributing criminal liability. In the absence of a full diminution in “substantial capacity” (equated with automatism), the alcoholic defendant is standardised according to the normative expectations that society has of the reasonable sober person, and the flawed rules pertaining to traditional intoxication doctrine apply. The law is viewed in black and white terms, whereas distinctive hues ought to apply to

different categorisations and gradations of substance abuse disorder. Fair labelling requires that an appropriate partial defence is available in murder cases where the defendant suffers from alcohol dependency syndrome or an alternative mental disorder; and reduced culpability levels apply in terms of preventing fault in that a “world of difference” exists between cases of homicide where the defendant killed whilst voluntarily intoxicated, and killings under the influence of alcohol dependency syndrome. It is our recommendation that the reformulated diminished responsibility plea in English law, within the purview of the Coroners and Justice Act 2009, may operate as a cathartic panacea to the rigid and mechanistic system imposed by the *Model Penal Code*, and reflects a new standardisation to intoxicated “offenders” encompassing legal and psychiatric conceptualisations of alcohol dependence syndrome, aligned with proposed amendments to the international classificatory systems. Potentiate liability principles determine that it is not a bifurcatory divide between voluntary and involuntary intoxication that should apply to the alcoholic offender, but rather a dissonance attached to partial and full responsibility at the T1 stage of individuation that is determinative, tied to an acknowledgement of the prevailing medical condition.

The reductionist approach to intoxicated offending, which imposes criminal liability by attempting to categorise the defendant’s conduct as voluntary or involuntary, is outmoded and the basis upon which criminal liability is constructed is inherently unfair. It is imperative that a more nuanced approach, utilising *dépeçage* principles to individuated scenarios is adopted on both sides of the Atlantic. A more transparent approach is required in order that defendants are appropriately punished for the crimes they commit, rather than on the basis that they voluntarily consumed alcohol at an earlier point in time, or on grounds of some psychological failing. When philanthropic Dr. Jekyll first took the potion that would transform him into the allegorical Mr. Hyde, he was unaware of the risk that Hyde would unlawfully kill Sir Danvers Carew.³¹⁴ The time is ripe for Dr. Jekyll and Mr. Hyde to be treated in accordance with their potentiate liabilities and criminal responsibilities properly addressed in a new reflective template.

314. STEVENSON, *supra* note 1, at 20-21.

Conclusion

Part One and Part Two of this collection critically elucidate the apparent difficulties associated with offenders with co-morbidity raising defences, and the challenges of accommodating a differentiated group of offenders beneath the *Majewski*¹³⁷ approach to intoxication. An alternative, and preferable, approach¹³⁸ was adopted by the High Court of Australia in *O'Connor*;¹³⁹ advocating that evidence of intoxication may be adduced in relation to all criminal offences. A comparative analysis reveals that repudiation of the *Majewski* rules does not represent a panacea for all the ills associated with determining the liability of those intoxicated by non-dangerous drugs and offenders with co-morbidity, but it provides a logical and fair starting point for evaluating legal responsibility. Concerns regarding the floodgates being open for drunken offenders to claim they should not be found liable due to their self-induced intoxication have not been borne out in jurisdictions that have departed from the *Majewski* approach.¹⁴⁰

The proposals advanced reject the construction of criminal liability based upon cognitive states of imputed recklessness. The rejection of constructive liability in relation to intoxicated offending is required before any meaningful review of mental condition defences can take place. This review ought to be holistic in considering all mental condition defences to ensure consistency in approach and application of the law in the context of vulnerable offenders. In terms of appropriate standardisation and fair labelling, this framework would introduce a new offence of dangerous intoxication. The imposition of liability would be attached to the offender's responsibility for creating a dangerous situation, rather than cognitive states of imputed *mens rea*. In terms of the variety of scenarios that arise in the context of intoxicated offending, *dépeçage* standardisations, as outlined in (iv), ought to apply. This reassessment provides a more balanced approach to reform in the context of vulnerable offenders. In terms of medication non-compliance, the Law Commission recommendations must be amended. The recommendations represent a dangerous extension of the problematic notion of prior fault. Engaging in an assessment of an offender's reason for non-compliance is likely to be notori-

¹³⁷ *Majewski* (n 70).

¹³⁸ Albeit one which is unlikely to garner political support in E&W, through fear of appearing 'soft on crime'.

¹³⁹ *O'Connor* (n 70).

¹⁴⁰ *Majewski* (n 70). See also, Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 2009).

ously difficult, and is unlikely to encourage medication compliance. In cases involving offenders with co-morbidity, failure to recognise the impact of their condition on criminal responsibility is unjust. Voluntary acute intoxication should be excluded from the defences, but this should not preclude consideration of underlying medical conditions. The law in this area remains in need of reform; the proposals advanced provide an optimal framework.

Part Three: *Comparative Perspectives on Exclusionary and Positive Restriction Reform Models*

(v) ‘Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes’¹⁴¹

(vi) ‘Political rhetoric or principled reform of loss of control? Anglo-Australian perspectives on the exclusionary conduct model’¹⁴²

(vii) ‘Anglo-Antipodean Perspectives on the Positive Restriction Model and Abolition of the Provocation Defence’¹⁴³

Introduction

Part Three departs from concerns relating to co-morbidity, and focuses on offenders who are vulnerable as a result of being subjected to family violence. These articles chart a pathway of the availability of the partial loss of control defence to the primary victim.¹⁴⁴ In rare cases, the primary victim may respond to this family violence with the use of lethal force. The loss of self-control requirement operating in E&W makes it difficult for primary victims to establish the defence, because it is unlikely an offender will lose self-control in response to a fear of serious violence.¹⁴⁵ The analysis addresses potential opportunities for optimal reform designed to afford the partial defence in meritorious cases, whilst ensuring the defence is not inappropriately utilised by the predominant aggressor.¹⁴⁶ These articles explore the exclusionary,¹⁴⁷ and positive restriction¹⁴⁸

¹⁴¹ *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (n 64) 115-134.

¹⁴² (n 82).

¹⁴³ *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (n 1) 365-405.

¹⁴⁴ Introduced in Part One.

¹⁴⁵ Susan Edwards, *Loss of Self-Control: When His Anger is Worth More than Her Fear* in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2011) 79-96.

¹⁴⁶ The predominant aggressor is the principal aggressor in the relationship who ‘has a pattern of using violence to exercise coercive control’; FVDRC (n 46).

¹⁴⁷ The exclusionary conduct model refers to law reform that excludes the availability of a particular defence through the use of exclusionary clauses.

¹⁴⁸ The positive-restriction-based model operating in NSW positively restricts the availability of the extreme provocation defence by requiring that the victim’s conduct amounts to ‘a serious indictable offence’ for the defence to be engaged.

reform models operating within E&W, and NSW, respectively, focusing upon the accessibility of the partial defences to primary victims and predominant aggressors.

Publication (v) focuses upon the availability of the partial defence in cases involving sexual infidelity and family violence. The loss of control defence in E&W is predicated on an exclusionary conduct model, prohibiting the application of sexual infidelity as a qualifying trigger for the partial defence.¹⁴⁹ Published prior to the *Clinton*¹⁵⁰ litigation, it is argued that it is unrealistic to isolate specific conduct from the multiplicity of factors that combine to induce a loss of self-control; complex cases involving a variety of factors ought to be dealt with by the trial judge utilising his exclusionary discretion, rather than through the use of arbitrary blanket exclusions.¹⁵¹ This view was confirmed by their Lordships in *Clinton*, when the court concluded that sexual infidelity may be considered where it 'is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of the partial defence.'¹⁵²

The NSW Committee advanced an exclusionary conduct model based upon sections 54-55 CAJA 2009, which would exclude the partial defence where the killing was in response to the victim's attempt to exercise personal autonomy, (for example, by leaving the relationship) except in cases of a most extreme and exceptional character.¹⁵³ Publication (vi) suggests exclusionary-based reform models must adopt an 'all or nothing' approach to be effective, otherwise offenders are likely to include something alongside the excluded conduct to bring the claim within the partial defence. Of course, 'all or nothing' exclusionary conduct models predicated on the conduct of the victim (rather than the offender), which may manifest in a variety of different ways and/or contexts, have the potential to cause injustice. The NSW parliament declined to enact the exclusionary conduct model, in favour of a positive-restriction-based reform model mandating the offender's loss of self-control was in response to a serious indictable offence.

¹⁴⁹ Coroners and Justice Act 2009, section 55(6)(c).

¹⁵⁰ *Clinton* (n 29). For discussion see Nicola Wake, 'Loss of control beyond sexual infidelity' (2012) *Journal of Criminal Law* 76(3), 193-197 (note) at Appendix E.

¹⁵¹ Coroners and Justice Act 2009, section 55(6)(c). It ought to be noted that this view is not universally held: Mohammad Mazher Idriss 'Sentencing guidelines for HBV and honour killings' (2015) *Journal of Criminal Law* 79(3), 198-210.

¹⁵² *ibid* [39].

¹⁵³ Thomas Crofts and Arlie Loughnan, 'Provocation, NSW Style: Reform of the defence of provocation in NSW' [2014] *Criminal Law Review*, Vol. 2014, 2, 109-125.

Publication (vii), assesses the efficacy of positive-restriction-based reform models. An in-depth comparison between the exclusionary conduct approach adopted in E&W, and the positive-restriction-based approach operating in relation to the extreme provocation defence in NSW is provided. This analysis demonstrates that these approaches have the potential to unfairly preclude the availability of the defence to the primary victim. The extreme provocation defence is yet to be tested by the courts, but there is concern that the serious indictable offence¹⁵⁴ requirement will render the defence unworkable.

This assessment is set against the position in NZ where the provocation defence has been abolished, on the basis that family violence towards a primary victim could be taken into account during the sentencing stage.¹⁵⁵ A review of NZ case law reveals, primary victims are being convicted of murder and the sentences imposed are almost double that issued pre-abolition.¹⁵⁶ A common failure to understand the circumstances of those who kill their abusers is partly to blame for the way the law deals with this type of case in these jurisdictions. In E&W, and NSW this can result in the primary victim agreeing to a plea bargain pre-trial rather than risk being convicted of murder.¹⁵⁷

A proposal, predicated on the law in Victoria, is advanced which would render social framework evidence¹⁵⁸ admissible during the trial and/or sentencing stage within these jurisdictions. Clear guidance on the types of evidence that should be made available in these cases would ensure consistency in application, in addition to assisting the criminal justice systems of the jurisdictions outlined to understand the circumstances of the primary victim. It is imperative that individuals within the criminal justice system have a

¹⁵⁴ An indictable offence punishable by imprisonment for life or a term of five years or more; Crimes Act 1900 (NSW), section 23 (2)(b) as amended by the Crimes Amendment (Provocation) Act 2014, schedule 1; and, Crimes Act 1900 (NSW), section 4, respectively.

¹⁵⁵ NZ Law Com IP 39, 2015 (n 11).

¹⁵⁶ See, for example, *Rihia* (n 70); *Wihongi* (n 70). For discussion, see (ix). It is worth noting that the new loss of control defence has not resulted in a significant change in the approach trial judges utilise in sentencing in provocation cases; Jeremy Horder and Kate Fitzgibbon, 'When sexual infidelity triggers murder: examining the impact of homicide law reform on judicial attitudes in sentencing' [2015] Cambridge Law Journal 74(2), 307-328.

¹⁵⁷ Considered in detail in Part Four, (ix).

¹⁵⁸ Social framework evidence is admissible in Victoria under section 9AH of the Crimes Act 1958 (Vic). Social framework evidence, which includes evidence of family abuse, is designed to help jurors to understand the circumstances of the offender. Further discussion is contained in (vii), page 401. For an excellent analysis of the use of expert evidence in diminished responsibility cases see: Fortson (n 71). See, Storey, (n 71) 15-19; and, (note), 'Murder – diminished responsibility' (2015) Archbold Review 1, 1-2.

better understanding of the nature and impact of family violence if justice is to be done.¹⁵⁹

¹⁵⁹ Thom Brooks recently provided a detailed illustration of the problems associated with misunderstanding domestic violence on This Week, *Made in Tyne and Wear* (2016) S9, Ep5, Part 4, when he forcefully argued that a 'new' form issued by the Home Office requiring British Citizens to report newly estranged partners to the Home Office for deportation has the potential to be used as a tool for domestic violence. Available: <<http://www.madeintyneandwear.tv/programme/the-week/>> accessed 26 January 2016.

Publication (v)

‘Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes’ in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2011) 115-134.

Chapter 8

Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes

Alan Reed and Nicola Wake

We would make ourselves look extraordinarily foolish if we say that a jury cannot take account of what most people recognise as being the most dominant cause of violence by one individual against another. Every opera you go to, every novel you read has sexual infidelity at one point or another. Otherwise it is not worth listening to ... It is an incredibly powerful voice. In every newspaper you read there is a case where somebody has killed or attempted to kill a spouse, lover, lost lover, or whatever. To rule this out as not being an area of activity where human passions are deeply engaged, leading to violent action, is absurd.¹

The Putative Search for a Rationale to the Heat of Passion Defence

It is essential that the ambit and theoretical underpinnings of loss of self-control as a partial defence to murder reflect contemporary attitudinal standards and societal mores. In English law this 'appropriate' standardisation was controversially transplanted by the government of the day into the final stages of the parliamentary process (at bill stage) to exclude sexual infidelity as a qualifying trigger for fact-finder evaluation.² The schematic template promulgated advanced specific triggers centred around fear of violence and partially justifiable anger but not in all senses, and not as the Law Commission³ had articulated. This was subsequently enacted in the Coroners and Justice Act 2009, and now 'the fact that a thing done or said constitutes sexual infidelity is to be disregarded'.⁴ The need for a consistent moral basis to the newly constituted loss of self-control defence mandated, in the view of some commentators, 'that it is unacceptable for a defendant who has killed an unfaithful partner to rely on that unfaithfulness to try to escape a murder conviction',⁵ and more broad criticism of sexual inequalities under extant law whereby, 'essentially what we have in this defence is moral culpability wrapped up in psychiatric nosology where instead anger, rage and jealousy are the sickness'.⁶

¹ HL Deb., 26 October 2009, 1061 (Lord Neill of Bladen).

² See generally, Jo Miles, 'A "Dog's Breakfast" of Homicide Reform' (2009) 10 Archbold News 6; and Leonard Leigh, 'Murder, Manslaughter and Infanticide: Proposals for Reform of the Law' (2008) 172 Justice of the Peace and Local Government Law, 700.

³ See Law Commission, *Partial Defences to Murder* (Law Com. No 290, 2004); Law Commission, *Murder, Manslaughter and Infanticide* (Law Com. No 304, 2006); and Ministry of Justice, *Murder, Manslaughter and Infanticide* (Law Com. CP No 19, 2008).

⁴ Coroners and Justice Act 2009, s. 55(6)(c).

⁵ HL Deb. (n. 1) 1062 (Lord Bach, Parliamentary Under Secretary of State).

⁶ Susan Edwards, *Sex and Gender in the Legal Process* (Blackstone Press, 1996) 402. See also Susan Edwards, 'Abolishing Provocation and Reframing Self-Defence – The Law Commission's Options for Reform' [2004] Criminal Law Review 181; and Susan Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74 Journal of Criminal Law 223.

The posited issue of whether the controversial exclusion of sexual infidelity fully accords with appropriate contemporary standards and societal mores of the day is considered further below. It is also appraised in the purview of the contextual ambit of the judge and jury in this perspective. The perceived need for change, however, reflected a view of heat of passion cases that deleteriously focused upon egregious precepts of male proprietorialness, jealousy and envy. The need to avoid these discreditable phenomenological reflections and behaviours precipitated the straitened boundaries of the new legislative reforms. Lord Hoffmann in *Smith (Morgan)*,⁷ had presaged the belief that for some aspects of personification of the characteristics of the reasonable man the jury's moral rigour should not be trusted. The partial defence, as in *Stingel*,⁸ an Australian case involving an excessively jealous boyfriend, who stalked his former girlfriend and then killed her new paramour, ought objectively to be removed from jury consideration by the trial judge:

Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman herself or her new lover ... it is suggested, a direction that characteristics such as jealousy and obsession should be ignored in relation to the objective element is the best way to ensure that *Stingel* cannot rely upon the defence.⁹

Difficulties have prevailed in Anglo-American law *vis-à-vis* the conditions of the defence relating to a response of excessive anger to the initial provoking act. Is it possible to delineate 'appropriate' responses to provoking acts in terms of compartmentalisation and prioritisation between the parameters of jealousy/envy/proprietorialness (wholly inappropriate) set against partially legitimate excessive anger invoked by violations of 'sacred' intimacy, humiliation and extreme breaches of trust? This raises the further dilemmatic choice(s) of whether different expectation levels, or rather continuums of level of control, are nuanced both within and outside intimate relationships. It is oxymoronic to refer to the excessively angered and sexually jealous, but 'reasonable' killer of a partner. The focus, as such, is not reflective standards of how this individual 'should' respond to ocular or verbal identification of an intimate partner cheating on their relationship, since *cadit quaestio*, the response is that it is never legitimate to kill.¹⁰ Rather, the lodestar of this heat of passion defence ought to be whether this mitigation can ever be appropriate in terms of the compartmentalised level of taunting producing consequential fatal action of a spontaneous nature which may in some limited circumstances be regarded as inappropriate but partially exculpatory conduct.¹¹ On one side of the divide Reilly,¹² and others,¹³ have asserted that: 'There seems no good reason why a defence based on loss of self-control should not also be extended to actors who kill under conditions of intense fear, or sadness, or under other emotional

7 [2001] 1 AC 146.

8 (1990) 171 CLR 312.

9 *Smith (Morgan)* (n. 7) 169.

10 Clare McDiarmid, 'Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law', in James Chalmers, Fiona Leverick and Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press, 2010) 201.

11 Ibid.

12 Alan Reilly, 'Loss of Self-Control in Provocation' [1977] 21 Criminal Law Journal 320.

13 See generally, Jeremy Blumenthal, 'Law and the Emotions: The Problems of Affective Forecasting' (2005) 80 Indiana Law Journal 155; and Ronnie Mackay and Barry Mitchell, 'Provoking Diminished Responsibility: Two Pleas Merging into One?' [2003] Criminal Law Review 745.

conditions such as compassion, depression or jealousy',¹⁴ whilst Horder,¹⁵ hugely influential in the context of recent English reforms, has presciently advocated a restricted provocative condition:

I have defended this view, in so far as fear for one's (or for another's) safety is concerned. How plausible is this view, though, when applied to, say, extreme emotional disturbance produced by "sadness", or by "jealousy", whether or not the victim was in any plausible sense causally implicated in bringing about the violent reaction? Every stalker who feels that the object of his obsessive love should be reciprocating, even though she has never shown the slightest interest in him, would in principle be entitled to be acquitted of murder if he deliberately killed her when he was "overcome" by sadness or jealousy at her continuing rejection. He would be so entitled, moreover, even if he had forearmed himself for the final encounter, which took the form of slitting her throat as she slept.¹⁶

At a practical level, the constrained exclusion in the Coroners and Justice Act 2009 of things done or said that constitute sexual infidelity will create interpretational difficulties, and reveals drafting of a tautological and imprecise nature. It is difficult, if not impossible, to countenance how something 'verbal' is embodied as occurrence/action of constituents of sexual infidelity. It may be that a purposive meaning is attached whereby things said *relating* to the infidelity fall within the confines of the section, but it is unfortunate that this matter has been expressed opaquely.¹⁷ Potentially, the section may not be as restrictive as purported. Infidelity is effected by the partner against the 'cuckolded' defendant; by parity of reason does the new provision consequently exclude from the parameters of restriction sexual acts or taunts by the new paramour of the victim in that they are not the actual progenitor of the 'infidelity'? Is 'infidelity' restricted to the confines of breach of marital relationships? Although unlikely as an intuitive response it remains a feasible argument until settled judicially. Moreover, the very pre-eminence attached to sexual infidelity as a primordial exclusionary basis, beyond other circumstances of 'appropriate' disenfranchisement such as honour killings, homophobic fatalities or gang-related violence, is regarded by many as illogical stereotyping.¹⁸

An unfortunate bifurcated divide may be created by this 'micro-management of the defence'.¹⁹ The separation, provides 'more harm than good'²⁰ in that the episodic nature of breaches of intimacy and ending of a relationship, beyond sexual infidelity, may be highly relevant and appropriate for jury consideration as part of all the circumstances appurtenant to a qualifying trigger of partially inculcated justifiable anger.²¹ As such, it may be troublesome to disentangle the nature and import

¹⁴ Reilly (n. 12) 329

¹⁵ Jeremy Horder, 'Reshaping the Subjective Element in the Provocation Defence' (2005) 25 Oxford Journal of Legal Studies 123.

¹⁶ Ibid., 138–9.

¹⁷ For an excellent discussion of key reforms pertaining to sexual infidelity see Rudi Fortson QC, 'Homicide Reforms Under the CAJA 2009' (Criminal Bar Association of England and Wales Seminar, October 2010). <http://www.rudifortson4law.co.uk/legaltexts/Homicide%20Offences_CBA_handout_for_16thOct2010_R_Fortson_submitted_v.7.pdf> (accessed 27 March 2011).

¹⁸ See generally, Amanda Clough, 'Loss of Self-Control as a Defence: The Key to Replacing Provocation' (2010) 74 Journal of Criminal Law 118.

¹⁹ Miles (n. 2).

²⁰ Ibid.

²¹ During Parliamentary debates, Lord Thomas of Gresford noted the problems with this approach: A 'woman who suffers neglect or violence at the hands of her husband over a period of years but who finally

of excessive taunts relating to cheating, inadequacy and disaffection. This resonates with confusion engendered at the very nub of this inclusionary/exclusionary argument with sexual jealousy or envy coalesced together and potentially transmogrified as the only embodiment of sexual infidelity *per se*. Shortly after the further liberalisation of the objectivised 'reasonable man' in *Morgan* (Smith),²² the Home Office noted its concern that the reinterpreted standard would make it easier for 'sexually jealous' defendants to claim provocation based on a spouse's 'sexual infidelity'.²³ Throughout the parliamentary debates these concerns were echoed²⁴ and it was suggested that the exclusion clause should preclude the defence to those who kill out of sexual jealousy/envy in response to sexual infidelity.²⁵ Sexual jealousy and sexual infidelity may constitute two very different conceptualisations in terms of emotion or act, and this led Horder to question which of the two the government really ought to exclude.²⁶ The search for a rationale to the heat of passion defence remains as confused as ever.

The American Experience: Reform and Traditional States

The English Law Commission in two detailed reports²⁷ prior to legislative reforms in the Coroners and Justice Act 2009, examined in detail the American jurisprudential landscape in the wider context of overall reforms to homicide with a new gradation of culpability template, and more specifically addressing partial defences to murder. At no point did a proposal materialise to unilaterally obfuscate sexual infidelity *per se* as a provoking circumstance. The debate more generally focused on the rationale for allowing loss of self-control to operate in partially exculpatory fashion.²⁸ In this regard the US experience provides an important source of comparative extirpation towards legitimate identification of the defence as grounded in either excusatory or justificatory concepts, or a combination of the two.²⁹ Although difficult to generalise about the US position, given divergence between reflective state practices, nonetheless a degree of bifurcation has emerged. This evaluation focuses on 'traditional' states which have followed a heat of passion defence reflective of an abridged and constrained English common law approach, which in many states

takes up the hammer or the meat knife when she sees him having sex with her best friend. That is the last trigger. She sees him being unfaithful, but she has had a terrible life up to that point ... must the jury ignore the proximate insult, the cause of her attack – namely, her seeing sexual infidelity in her husband – and simply consider provocation on the basis of the treatment of her over a period of years leading up to that point? How do you expect the jury to disentangle one set of circumstances from another?' HL Deb., 11 November 2009, 840.

²² *Smith (Morgan)* (n. 7).

²³ Home Office, *Safety and Justice: The Government's Proposals on Domestic Violence* (Cmnd 5847, 2003) para. 64.

²⁴ HL Deb. (n. 21) col. 835.

²⁵ *Ibid.*, col. 836.

²⁶ Memorandum from Jeremy Horder to the House of Commons (Coroners and Justice Bill, Committee Stage, 3 February 2009, CJ 01).

²⁷ Law Com. No 290, 2004 (n. 3); and Law Com. No 304, 2006 (n. 3).

²⁸ See generally, Law Com. No 304 2006 (n. 3) paras 5.61–5.77; and Oliver Quick and Celia Wells, 'Getting Tough with Defences' [2006] *Criminal Law Review* 514, 524, who assert, 'Male killing is about power and control. Women killing abusers is about avoiding power and control ... women do not often kill from anger, while anger is what fuels many male killings.'

²⁹ Law Com. No 290, 2004 (n. 3) para. 3.47–3.59, and App. F.

follows pre-1957 Homicide Act reform.³⁰ Alternatively, a number of 'reform' states, at least in part, have adopted a more liberalised 'subjectivised' perspective based upon Model Penal Code §210(3)(1)(b) which looks to a test of 'extreme mental and emotional disturbance', and precipitates far greater jury consideration.³¹ This latter point, the divide between the role and province of the judge and jury as contemporary arbiters of sexual infidelity killings, is absolutely fundamental in different jurisdictions, and the comparative significance is important to detail.

Sexual infidelity killings may straddle the analytical divide in terms of conceptualisation of the partial defence as either justificatory or excuse in basis.³² The 'justificatory' embodiment of a defence concentrates upon a recognition that the conduct was legitimate in the presented circumstances and that punishment should be mitigated since harm caused is outweighed by the need to avoid an even greater harm or to further a greater societal interest;³³ whereas an excuse, 'represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him'.³⁴ In the context of sexual infidelity, as stated, if the defence is articulated via the legal prism of partial justification, the primordial consideration is on the provoker's conduct, and whether it may be stigmatised as wrongful, untoward or egregious in the first place. The core of the justificatory defence is that a fatality ought to be standardised as 'morally less reprehensible' than murder where the victim abjures some responsibility for their impact on producing the provokee's rage and anger.³⁵ Intuitively the paradigm shift towards the provoker's conduct (the victim) seems inapposite, and obviously raises the hackles of their affronted and distressed family, in light of the genuflective role reversal. On the contrary if a sexual infidelity killing is viewed as partially excusatory in nature, then via this kaleidoscope the pre-eminent examination attaches to the provokee and whether the cuckolded or taunted defendant lacked personal culpability for some (at least partially) valid reason.³⁶

30 See generally, Douglas Brown, 'Disentangling Concessions to Human Frailty: Making Sense of Anglo-American Provocation Doctrine through Comparative Study' (2007) 39 *New York University Journal of International Law & Politics* 675; and Paul Robinson, 'Abnormal Mental State Mitigations of Murder: The US Perspective', Chapter 17, *infra*.

31 See, generally, Kevin John Heller, 'Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defence and Provocation Cases' (1998) 26 *American Journal of Criminal Law* 1.

32 In terms of the dichotomy between justification and excuse note the succinct illustration provided by Kent Greenawalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 *Columbia Law Review* 1897-1927: 'If A's claim is that what he did was fully warranted - he shot B to stop B from killing other people - A offers a justification: if A acknowledges he acted wrongfully but claims he was not to blame - he was too disturbed mentally to be responsible for his behaviour - he offers an excuse.' See also Vera Bergelson, 'Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law' (2005) 8 *Buffalo Criminal Law Review* 385, 414, who asserts, 'The fact that the law asks not only how badly the actor was distressed, but also *why* he was so badly distressed implies that the rationale for the defence lies in the *source* of provocation, not merely the actor's disturbed state of mind.'

33 Paul Robinson, *Criminal Law Defenses* (Thompson West, 1984) s. 24(a), 83. See also Paul Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 *Columbia Law Review* 199.

34 *Ibid.*, s. 25(d). See, generally, Mitchell Berman, 'Justification and Excuse, Law and Morality' (2003) 53 *Columbia Law Review* 1-77.

35 Law Commission, *Partial Defences to Murder* (Law Com. No 137, 2003) paras 12.12-12.17.

36 *Ibid.*, para. 12.15.

The partially valid reason (excuse) in heat of passion cases has been the focus of detailed and expert examination by a number of leading commentators in the US.³⁷ The killer, confronted by ocular or verbal taunts relating to a partner's infidelity, and subject thereby to excessive anger of an internalised nature, may be partially excused according to Dressler's analysis since, 'anger affects choice-capabilities, not mere opportunities'.³⁸ Anger may be an inculcated emotion which is embodied as 'a normal and expected human response to the situation',³⁹ and thereby the accused, is consequentially, 'less able to respond in a legally and morally appropriate fashion'.⁴⁰ Arguments, however, range across the divide as Nourse,⁴¹ in an expert critique of intimacy killings within Model Penal Code (hereinafter MPC) states, has reflected in her conclusions that a fresh appraisal *de novo* is required whereby the defence should be severely constrained to individual cases in which the provoking act is itself a 'wrong' that the law would punish irrefragably by imprisonment.⁴² The defence, although partially justificatory in ascription, viewed through the impact of the provoker's illegal conduct, would be severely curtailed in nature and delimited by the 'wrongfulness' of the provoker's conduct leading to potential incarceration.⁴³

A number of US academicians,⁴⁴ although promoting a justificatory perspective leading to a deduction of liability in certain cases, have suggested a categorisation between 'act justification' and 'emotion justification'.⁴⁵ The sight of a partner committing adultery or other breaches of intimacy such as dancing provocatively with another, although potentially 'emotion-justified' could never in this perspective ever be 'act-justified'.⁴⁶ No deduction of concessionary/mitigatory liability would occur.⁴⁷

In this brief articulation of potential heat of passion rationale(s), a subject upon which much ink has been spilt, there is an exposition of the difficulties presented in achieving a conceptual edifice for this controversial defence. This struggle is evident in the Law Commission's minute examination of the issue,⁴⁸ and consideration of disparate approaches. The result contained in the Coroners and Justice Act 2009 is a significant momentum shift, outwith the exclusion of sexual infidelity more generally, and reflects a movement away from 'compassionate excuse' as a juridical

37 See, for example, Joshua Dressler, 'Why Keep the Provocation Defense? Some Reflections on a Difficult Subject' (2002) 86 Minnesota Law Review 959; Emily Miller, '(Wo)manslaughter: Voluntary Manslaughter, Gender and the Model Penal Code' (2001) 50 Emory Law Journal 665; and Joshua Dressler, 'When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances and the "Reasonable Man" Standard' (1995) 85 Journal of Criminal Law & Criminology 726.

38 Joshua Dressler, 'Rethinking Heat of Passion: A Defense in Search of a Rationale' (1982) 73 Journal of Criminal Law & Criminology 421, 464.

39 Ibid.

40 Ibid.

41 Victoria Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1997) 106 Yale Law Journal 1331.

42 Ibid., 1396.

43 Ibid.

44 Susan Rozelle, 'Controlling Passion: Adultery and the Provocation Defense' (2005) 37 Rutgers Law Journal 197. See also Miller (n. 37) 29, and Robert Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 California Law Review 133.

45 Rozelle, *ibid.*, 228.

46 Ibid.

47 Ibid., 233.

48 Law Com. No 137, 2003 (n. 35) at para. 12.12–12.17; Law Com. No 290, 2004 (n. 3); and Law Com. No 304 (n. 3).

touchstone towards 'imperfect justification' as a qualifying trigger.⁴⁹ This partial justification reflects normative beliefs in fear and anger as partially appropriate responses to causally related behaviour of the provoker. If the government had not intervened at the last minute to exclude sexual infidelity as a circumstance then sight of adultery or taunts of infidelity would have been relevant to the qualifying trigger of partially justified inculcated anger. Justification would have provided partial exculpation, or might potentially have exculpatory effect in consideration by the jury of all the circumstances:

we think that the moral blameworthiness of homicide may be significantly lessened where the defendant acts in response to gross provocation in the sense of words or conduct (or a combination) giving the defendant a justified sense of being severely wronged. We do not think that the same moral extenuation exists if the defendant's response was considered, unless it was brought about by a continuing state of fear. (There are also strong policy reasons for the law not to treat vendettas as partial excuses.) We do not suggest that these are the only circumstances which could significantly extenuate moral responsibility for homicide, but we do think that they fall into a distinct category.⁵⁰

As previously stated, beyond the theoretical extrapolations of a rationale for the heat of passion defence, a significant divergence in approach applies at a practical level in the US.⁵¹ This bifurcatory divide is between the traditional common law states whose principles reflect an austere orthodoxy reflective of pre-1957 English antediluvian tradition,⁵² and by way of comparison, the number of states who have adopted a more 'subjectivist' MPC approach.⁵³ The different treatment of sexual infidelity and killings attendant to intimacy breakdown is significant and relevant. In the former case, despite varying nuances, the general proposition in the preponderance of jurisdictions has been that a provocation defence will be applicable (including for cases of sexual infidelity killings) which 'involves the intentional killing of another while under the influence of a reasonably-induced ["heat of passion"] causing a temporary loss of normal self-control'.⁵⁴ Similar to pre-existing English common law, US jurisprudential authorities have generally applied the defence only if the provocation, 'would render any ordinarily prudent person for the time being incapable of that cool reflection that otherwise makes it murder'.⁵⁵ Many state jurisdictions have

49 Alan Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder: (1) Loss of Control' [2010] Criminal Law Review 275, 284.

50 Law Com. No 290, 2004 (n. 3) para. 3.63, asserting the key rationale for the defence. Note also para. 3.38 considering excessive anger: 'anger can be an ethically appropriate emotion and that in some circumstances it may be a sign of moral weakness or human coldness not to feel strong anger. That does not legitimise a violent response, one of the functions of the legal system is to channel legitimate anger at wrongdoing in ways that are considered just and proportionate. Nevertheless, a killing in anger produced by serious wrongdoing is ethically less wicked, and therefore deserving of a lesser punishment, than, say a killing out of greed, lust, jealousy or for political reasons.'

51 Paul Robinson, 'Abnormal Mental State Mitigations of Murder: The US Perspective', Chapter 17, *infra*.

52 Dressler, 'Rethinking Heat of Passion: A Defense in Search of a Rationale' (n. 38) 429–31.

53 Dressler, 'Why Keep the Provocation Defense? Some Reflections on a Difficult Subject' (n. 37) 984–8.

54 Wayne LaFare, *Criminal Law* (4th edn, West, 2003) 776.

55 *Addington v. United States*, 165 US 184, 186 (1897). See also *Fields v. State*, 52 Ala 348, 354 (1975) (stating that in order to constitute a defence, the provocation must 'in the mind of a just and reasonable man stir resentment to violence endangering life ...'), *People v. Webb*, 300 P 2d 130, 139 (Cal Dist Ct App 1956) (finding provocation as would 'naturally tend to arouse the passion of an ordinarily reasonable man').

adopted rigid deontological reasoning to the traditional heat of passion defence, notably in denying words of infidelity alone to be supererogatory, and through a straitened role for judge and jury.⁵⁶ A vignette of this constriction, indicative of many state practices, was reflected by the decision of the Supreme Court of Ohio in *State v. Shane*.⁵⁷

In *Shane*, the defendant shared an apartment in Philadelphia with his fiancée and their infant son.⁵⁸ After she verbally confessed to sleeping with other men and stated that she no longer cared for the defendant, he lost control and strangled her to death.⁵⁹ Two important matters arose for consideration by the Supreme Court of Ohio: (i) the issue of the exact province of judge and jury over the ambit of a provocation plea;⁶⁰ and (ii) the issue whether 'mere words' of a victim were reasonably sufficient provocation to incite the use of deadly force.⁶¹ Could verbal admission of infidelity and breach of intimacy constitute adequate provocation?

In terms of the former issue the court determined that even when some evidence of adequate provocation is presented, the trial judge should only grant a voluntary manslaughter instruction if the jury could reasonably find the defendant guilty of the lesser offence.⁶² In essence, the trial judge in traditional common law states is granted discretion, and operational control of the exculpatory defence is within their purview, to decide whether to give a voluntary manslaughter instruction by applying an objectified standard to determine whether a reasonable person would be provoked to act out of passion rather than reason.⁶³ A circumscribed role for jury consideration of the loss of self-control defence has been mandated in the Coroners and Justice Act 2009 reforms (see below), replacing the liberalised test of jury adoption in s. 3(1) of the Homicide Act 1957:

The Homicide Act, in allowing insults as provocation, inevitably alters the position, because an insult uttered in private is neither a crime nor even a tort. S3 contains no restriction to unlawful acts, and the courts seem to be ready to allow any provocative conduct to be taken into consideration, even though that conduct was itself provoked by the defendant. Consequently, there is no longer any reason why the defence should not be available (if the jury uphold it) to the jilted lover who kills the object of his affections or her new lover, or the man who kills his irritating neighbour, or the parent who kills a constantly crying baby.⁶⁴

Could the verbal confessions of infidelity by the provoker (victim) in *Shane* constitute sufficient provocation to incite the use of deadly force, and consequently partially justify the provokee's fatal response? The court categorically rejected this proposition, and mechanistically drew a bright-line

⁵⁶ Brown (n. 30); and Heller (n. 31).

⁵⁷ 590 NE 2d 272 (Ohio 1992); and Mark Biggerman, 'State v. Shane: Confessions of Infidelity as Reasonable Provocation for Voluntary Manslaughter' (1993) 19 Ohio Northern University Law Review 977.

⁵⁸ *Shane*, *ibid.*, 273.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 276.

⁶¹ *Ibid.*, 277.

⁶² *Ibid.*, 275.

⁶³ *Ibid.*, 278. Note that 'in each case the trial judge must determine whether evidence of reasonable sufficient provocation occasioned by the victim has been presented to warrant a voluntary manslaughter instruction', *ibid.*, 276 (fn. 2). 'The judge furnishes the standard of what constitutes adequate provocation ... which would cause a reasonable person to act out of passion rather than reason', quoting *People v. Pouncey*, 471 NW 2d 346, 350 (Mich, 1991).

⁶⁴ Glanville Williams, *Textbook of Criminal Law* (2nd edn, 1983) 534–5.

test for general adoption.⁶⁵ The majority of jurisdictions in the US have subsequently determined that mere words, no matter how inflammatory, are not sufficient provocation to allow the reduction of murder to voluntary manslaughter,⁶⁶ albeit some courts have permitted inclusion in a marital rather than unmarried relationship.⁶⁷ The synergistic effect of the twin issues reconciled in *Shane* has been to delimit the provocation plea in Ohio, and other traditional common law states. The trial judge remains empress as the gatekeeper for consideration of the defence at all, and verbal confessions of adultery are generally denied recognition.

A wholly different comparative outlook applies in the minority of states in the US that have passed legislation similar to the American Law Institute's Model Penal Code.⁶⁸ The result has been an extraordinary liberalisation of the provocation defence, in marked contrast to the austerity and rigidity of the traditional common law circumscription.⁶⁹ As such, the MPC template provides an illuminating counterpoise for evaluation as a contrast to the restrictive Coroners and Justice Act 2009 provisions, especially the bulwark presented to fact-finder engagement with ocular and verbal attachments to infidelity.⁷⁰ Under §210.3(1)(b) of the MPC, any intentional killing will be viewed as manslaughter when, 'committed under the influence of extreme mental or emotional disturbance for which there is no reasonable explanation or excuse'. Further, the MPC allows a heightened subjectivist appraisal of personified characteristics because it requires a jury to examine the reasonableness of the actor's conduct 'from the viewpoint of a person in the actor's situation under the circumstances as he believed them to be'.⁷¹

The consequential effect in MPC states has been to obviate the common law traditional requirement pertaining to 'adequate provocation'; draw a coach and horses through the bright-line

⁶⁵ *Shane* (n. 57) 278.

⁶⁶ See, for example, *Hambrick v. State*, 353 SE 2d 177, 179 (Ga 1987) ('provocation by words alone is inadequate to reduce murder to manslaughter'), *Perigo v. State*, 541 NE 2d 936, 939 (Ind 1989) (holding that victim's words alone, though highly emotional, were not sufficient provocation to reduce murder to manslaughter), *People v. Eagen*, 357 NW 2d 710, 711–12 (Mich Ct App 1984) (noting that defendant's claim of provocation based on former girlfriend's remark about sex was without merit).

⁶⁷ See for example, *People v. Williams*, 576 NE 2d 68, 73 (Ill App Ct 1991) ('an admission of adultery is equivalent to a discovery of the act itself'), *Commonwealth v. Schnopps*, 417 NE 2d 1213, 1215–16 (Mass 1981) (holding that sufficient provocation may be found in information conveyed to a defendant by word alone when there is a marital relationship). Note Dressler's criticism, 'Rethinking Heat of Passion: A Defense in Search of a Rationale' (n. 38) 440, of this limitation to marriage in the cases where one unmarried lover discovers another being unfaithful: 'an unmarried individual who kills upon sight of unfaithfulness by one's lover or fiancée is [considered] a murderer. Only a highly unrealistic belief about passion can explain this rule in terms of excusing conduct. It is implausible to believe that when an actor observes his or her loved one in an act of sexual disloyalty, that actor will suffer from less anger simply because the disloyal partner is not the actor's spouse. Instead, this rule is really a judgment by courts that adultery is a form of injustice perpetrated upon the killer which merits a violent response, whereas "mere" sexual unfaithfulness out of wedlock does not. Thus, it has been said that adultery is the "highest invasion of [a husband's] property" whereas in the unmarried situation the defendant "has no such control" over his faithless lover.'

⁶⁸ As Robinson comments in Chapter 17, *infra*, nn. 56–7, although 34 states adopted modern comprehensive codes promulgated around the MPC, only 11 of the 34 states actually embraced the MPC's 'extreme emotional disturbance formulation': Arkansas, Connecticut, Delaware, New York, Hawaii, Kentucky, Maine, Montana, North Dakota, Oregon and Utah. Further, only five states within the 11 adopted the proposal without 'significant' alterations or modifications.

⁶⁹ Law Com. No 290, 2004 (n. 3) App. F, 271–2.

⁷⁰ *Ibid.*

⁷¹ Model Penal Code, §210.3(1)(b) (hereinafter MPC).

mechanistic provision denying that words alone can never provide an exculpatory mitigation; and significantly enhances jury appraisal of provoking circumstances and individual characteristics of an accused tangentially invoking reduced powers of self-control (provocability).⁷² Arguably, an evaluative free-for-all has been engendered, lacking reflection of contemporary attitudinal standardisation of fidelity/infidelity and expected powers of individual ratiocination or control. In many respects the impact has been to emasculate the role of the trial judge, and simply letting fact-finders decide in this regard reflects unfortunate judicial abstentionism, 'The very act of sending a case to a jury requires some kind of normative judgment, some choice about those cases in which a rational jury could find a "reasonable" explanation for rage.'⁷³ The impact of this liberalisation has, on occasions, proved extraordinary with *Dixon v. State*⁷⁴ a notorious cause célèbre illustration of the unfortunate consequences of unrestrained mitigatory principles devoid of effective distillation by the trial judge.

The defendant in *Dixon* violently beat his fiancée to death, the attacks occurring over an extended period, after the victim had the 'temerity' to dance with another man at her engagement party.⁷⁵ The consecutive assaults transpired directly at the party itself, at her sister's home when the defendant followed her, and the fatal violence took place in the early hours of the morning at their own home. In accordance with MPC §210(3) it was determined that a reasonable jury in Arkansas could decide, and the trial judge empowered them accordingly, whether totally outwith acts or taunts of sexual infidelity, merely dancing with another man at her engagement party provided a 'reasonable' excuse for the excessive anger of that affronted defendant.⁷⁶ A manslaughter verdict followed amazingly, on that predicate. It seems the truism that hard cases make bad law applies in equal measure to rather more straightforward determinations! The result has been to liberalise the provocation defence in reform states,⁷⁷ as Nourse has expertly reviewed in an in-depth study, way beyond the parameters of any appropriate 'concessionary' defence. Examination has revealed that in these reform states the fact-finders, without normative iteration by the trial judge of the legitimate constraints of the defence, have been presented with situations for consideration far beyond heat of passion infidelity, and within the different strictures of simple relationship breakdown, termination of intimacy, departures from shared accommodation and any kind of 'disrespectful' flirting with another:

Reform has permitted juries to return a manslaughter verdict in cases where the defendant claims passion because the victim left, moved the furniture out, planned a divorce, or sought a protective order. Even infidelity has been transformed under reform's gaze into something quite different from the sexual betrayal we might expect – it is the infidelity of a fiancée who danced with another, of a girlfriend who decided to date someone else, and of the divorcée found pursuing a new relationship months after the final decree. In the end, reform has transformed passion from the classical adultery to the modern dating and moving and leaving. And because of that transformation, these killings, at least in reform states, may no longer carry the law's name of murder.⁷⁸

72 See, generally, Dressler, 'Why Keep the Provocation Defense? Some Reflections on a Difficult Subject' (n. 37) 984–8.

73 Nourse (n. 41) 1372.

74 *Dixon v. State*, 597 SW 2d 77 (Ark 1980).

75 Ibid., 78. See generally, Rozelle (n. 44).

76 Ibid.

77 Nourse (n. 41).

78 Ibid., 1332–3. See, further, Nourse's expository rationale for the defence: 'To merit the reduction of verdict typically associated with manslaughter, the defendant's claim to our compassion must put him in a

The polemics in the US reveal a significant divide between reform and traditional states in their treatment of sexual infidelity killings, and other state adoption ranges along this continuum. This chasm is currently manifested in Anglo-Scottish law⁷⁹ with fundamental differences in operability and applicability. As with US comparative appraisal, an extirpation of the rationale behind this bifurcation between the Scylla and the Charybdis on concessionary defences, may enervate discussion and provide support for a *via media* approach.

Scottish Law and Contemporary Standardisation of Sexual Infidelity Cases

A remarkable anachronism has occurred in Anglo-Scots law in this arena. South of the border things done or said constituting sexual infidelity are disenfranchised from fact-finder evaluation on loss of self-control. The polar opposite applies north of the border and the very same behaviour in this context forms one of only two bases for consideration by fact-finders. In one jurisdiction sexual infidelity represents the very essence of mitigatory behaviour and of primordial importance, yet for a few miles of geographic separation it is pre-eminently excluded. A provoked defendant in Edinburgh who kills through ocular and verbal taunts of a partner's infidelity may, in certain circumstances, rely on the partial defence to reduce murder to manslaughter (culpable homicide).⁸⁰ On the very same facts in Berwick that defendant is precluded from jury consideration of the defence as sexual infidelity leading to excessive anger no longer forms a qualifying trigger within the Coroners and Justice Act 2009. The different jurisdictions have figuratively taken the high and low road in respect of the separate pathways to liability in their doctrinal perspectives. It mirrors the recent demarcation that has occurred between the House of Lords⁸¹ and the High Court of Justiciary⁸² in the substantive context of homicide liability of a drug supplier where a victim has ingested the drug themselves with full capacity. Radically different views now prevail in terms of issues related to causation, foreseeability and voluntariness in drug administration cases.⁸³

The two qualifying conditions in terms of provoking behaviour in Scottish law, those of violence and the discovery of sexual infidelity, reflect the historical lineage of the provocation defence set out in this chapter. At the heart of the partial defence in Scotland lies excessive anger, poorly controlled, where the emotion is generated by unjustified actions by a provoker, and the accused's response may be partially vindicated as a concession to human frailty and weakness, and that it

position of normative equality *vis-à-vis* his victim. A strong measure of that equality can be found by asking whether the emotion reflects a wrong that the law would independently punish ... My proposal would also bar the defense in cases in which the defendant claimed rage inspired by infidelity. Society is no longer willing to punish adultery.'

⁷⁹ For an excellent topical discussion of extant Scottish law, see McDiarmid (n. 10).

⁸⁰ See, generally, *Drury v. HM Advocate* 2001 SLR 1013; *HM Advocate v. Hill* 1941 JC 59; and *Low and Reilley v. HM Advocate* 1994 SLT 277.

⁸¹ *Kennedy (No 2)* [2007] UKHL 38, [2007] 4 All ER 1083, 1090, where Lord Bingham determined that the victim's independent act operates as a bulwark against liability for unlawful act manslaughter in this scenario. See, generally, Alan Reed and Ben Fitzpatrick, *Criminal Law* (4th edn, Sweet & Maxwell, 2009) 49.

⁸² *Michael Kane v. HM Advocate*, *The Times*, 2009 SLT 137. The High Court of Justiciary, focusing upon issues of immediacy and directness of the ingestion allied to foreseeability of action (V's conduct) determined that Scots law in appropriate cases might attribute liability for ingestion and so for death to the reckless offender (culpable homicide). Reliance was placed on extant law in certain states in the US and in South Africa.

⁸³ Reed and Fitzpatrick (n. 81) 46–50.

may be appropriate.⁸⁴ The embodiment, in policy terms, of this linkage between provoking conduct (sexual infidelity) and fatal violence is that, 'law recognises that when an accused discovers that his or her partner, who owes a *duty of sexual fidelity*, has been unfaithful, the accused may be swept with sudden and overwhelming *indignation* which may lead to a violent reaction resulting in death'.⁸⁵ The continued pre-eminence attached to a 'duty of fidelity' and righteous 'indignation' gives cause for disquiet, and we shall return to contemporary standardisation of the social mores attached to fidelity/infidelity subsequently. It is also provided in Scottish law that verbal taunts of infidelity may constitute provocative behaviour, the over-reaction to the infidelity must equate to that of an ordinary man and woman who has not been personified with individual characterisation, and aligned with this the loss of self-control must be immediate.⁸⁶ Experience reveals, unsurprisingly, that the defence has been male-dominated in application,⁸⁷ and indeed it was not until 1996 that it was acknowledged in Scotland that women could rely on this 'exceptionally' provocative nature as a defence;⁸⁸ a defence stigmatised in Anglo-Scottish antediluvian heritage as 'bound to encourage and exaggerate a view of human behaviour which [was] sexist, homophobic and racist'.⁸⁹

The exceptionally provocative nature of sexual infidelity, consequently providing a partial defence, has arisen in Scotland across a widened ambit of behaviour patterns, as in reform states in the US, beyond catching your married partner in bed with a new paramour and responding instantaneously with violence. It applied in *HM Advocate v. Hill*,⁹⁰ where a returning army corporal killed his wife and new partner in the marital home with a service revolver. A demarcation applied from traditional heat of passion in that the accused had been informed previously about his wife's affair, and the killing had nuances of premeditation, planning and revenge. More recently, it applied in *Drury v. HM Advocate*,⁹¹ in the context of an unmarried couple whose relationship may have ended, but they continued a sexual relationship. The accused was affronted by the non-exclusivity of this intimacy and in 'indignation' killed the victim with a claw hammer. Prior conduct engaged stalking the victim, and the defendant had five convictions for breach of the peace attendant to this behaviour. As previously stated, Lord Justice-General Rodger highlighted that the ambit of the sexual infidelity concessionary defence focused around sudden 'indignation' and controversially the emotional turbulence created by the casting aside of a 'duty of sexual fidelity'.⁹²

In terms of contemporary standardisation of behaviour and values it seems completely anathema to current social mores of attitudinal behaviour to propagate any 'duty of sexual fidelity'. Views on fidelity or otherwise may differ widely at a societal level, and within the confines of marital/unmarried individual relationships. Whilst to some breach of relationship trust in an exclusive and intimate relationship, a relationship at the epicentre of their life, may prompt excessive anger and a violent emotional outburst, to others in a partnership it may be a matter of complete indifference.⁹³

84 McDiarmid (n. 10) 201-3.

85 *Drury v. HM Advocate* 2001 SLT 1013 [75] (Lord Justice-General Rodger) (emphasis added).

86 Ibid., [25]-[32].

87 See generally, Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (n. 6).

88 McDiarmid (n. 10) 207, who also asserts, 'The defence is now available to anyone in a situation in which sexual fidelity is expected including cohabitantes, and those in same-sex relationships, and even following *Drury v. HM Advocate*, on/off relationships where the parties occasionally sleep together.'

89 Celia Wells, 'Provocation: The Case for Abolition', in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 2000) 85.

90 *Hill* (n. 80).

91 Above (n. 85).

92 Ibid., [25].

93 McDiarmid (n. 10) 208.

It is not that excessive taunting about another's infidelity, or witnessing the behaviour at first hand, is not exceptionally provocative (or may be to some), but rather whether it should be given the pre-eminent qualifying threshold attached in Scotland.⁹⁴ At the same time the exclusion of such provoking behaviour in English law – like many last minute government reforms⁹⁵ without proper reflection, consideration and thorough debate – seems counter-intuitive in some cases of excessive taunting prompting extreme 'uncontrolled' reactions through partially justified inculcated anger. A *via media* can beneficially be promulgated in both jurisdictions allowing a proper role for judge and jury. The following five illustrations are highlighted to demonstrate that different gradations may apply within 'things done or said that constitute sexual infidelity', and consequentially that on occasions a more nuanced approach than currently applies in Anglo-Scottish law needs to be deconstructed and adopted:

- A man was told by his wife that as soon as their children had left home she would leave him and live with another man whom she'd known for many years. He brooded on this for four weeks and then killed her by poisoning her tea. He said he couldn't bear the thought of her being with another man, and psychiatrists reported that he suffered from an extreme form of jealousy ('The Brooding Jealous Husband').⁹⁶
- A man, whose wife had had a series of affairs with other men, decided to kill her if she had another affair. Soon afterwards, he discovered she was having a further affair and he strangled her to death. Psychiatrists reported that he was not mentally ill ('The Cuckolded Husband'). Suppose instead that when he discovered that she was having an affair he confronted her and she taunted him about his sexual inadequacy – whereupon he lost his temper and killed her ('The Taunted Husband').⁹⁷
- D's marriage is broken up when his wife is seduced by a wealthy adventurer, V. D is distraught. One day D hears V boasting in a pub of his sexual victories, including with Mrs D. D gets up to leave. V notices him and taunts him. D sees red, picks up a bottle and brings it down on V's head, causing a fractured skull from which V dies. ('Taunting by New Paramour').⁹⁸
- D is devastated when her husband, V, with whom she has been involved in a committed and devoted relationship for ten years, has embarked on an affair with her best friend (P). V, in order to humiliate D, has posted many intimate pictures of P and himself together on Facebook and other social networking sites with explicit references to D's sexual inadequacies. These pictures have also been disseminated to all of D's family and friends, and to all her work colleagues. Humiliated, she has felt compelled to leave her beloved job. She returns to the marital home to find all her possessions left in bin bags in the street. V

⁹⁴ Ibid., 209.

⁹⁵ University tuition fees may provide a moot point in this regard, allied with fluctuations regarding the 10p starting rate of income tax!

⁹⁶ See Law Com. No 290, 2004 (n. 3) App. C, 'A Brief Empirical Study of Public Opinion Relating to Partial Defences to Murder presented by Mitchell'. A sample of 62 respondents were presented with a variety of homicide scenarios, with objectives to determine whether each particularised scenario was regarded as one of the more or less serious homicides, and to identify factors which influenced this assessment. Note scenario (i) in the text is repeated verbatim from Mitchell's scenario H ('The Brooding Jealous Husband').

⁹⁷ Ibid., scenarios J1 and J2 presented by Mitchell.

⁹⁸ This illustration was presented by the Law Commission who asserted that they did *not* believe that the general public would consider a sentence of life imprisonment to be appropriate; see Law Com. No 137, 2003 (n. 35) para. 12.25.

and P are present at the time with P in night apparel. V mocks her again over her sexual inadequacies, his new relationship and the intimate photographs. D picks up some broken glass off the pavement from a shattered wedding picture, and stabs V in the throat killing him instantly ('Excessive Taunting and Sexual Humiliation').

- D loses self-control and kills V when V (D's husband) admits having had long-standing affairs with (and made pregnant) each of D's three 16–18-year-old daughters by a previous marriage ('Extreme Breach of Trust').⁹⁹

The first two illustrations above formed part of a survey of public opinion relating to partial defences to murder expertly conducted by Mitchell¹⁰⁰ as part of the Law Commission project. The responses in situation (i) and to the first part of (ii) revealed little sympathy for the defendant in light of premeditation, no adequate response, and suspicions centred around extreme jealousy.¹⁰¹ A different picture was apparent where the accused responded to an immediate taunt of infidelity, with a proportion of respondents identifying this spontaneity as a rationale for a mitigatory sentence of less than ten years' imprisonment. Importantly, there was no significant difference between the replies of male and female respondents.¹⁰² In terms of community standardisation and contemporary social rectitude it is interesting that scenario (iii) above was presented by the Law Commission in their consultation paper as a key example of a case where the 'general public' would not consider a sentence of life imprisonment to be appropriate.¹⁰³

The postulation in (iv) is presented *de novo* to suggest that a *via media* needs to be adopted in Anglo-Scottish law. In general terms verbal taunts of infidelity will rarely be sufficient to allow a concessionary defence, but circumstances of 'a most extreme and exceptional character' may, on occasions, apply.¹⁰⁴

Beyond excessive taunting, example (v), presented to the Commons by Horder during the committee stages of the Coroners and Justice Bill, is representative of sexual infidelity as provocative conduct in its most extreme form. The scenario expertly highlights that a loss of control in response to the actions of a faithless lover, in some cases, has much more to do with the breach of trust involved, and serious relationship violation, rather than proprietorial instinct.¹⁰⁵ Sexual infidelity should 'never be an excuse or justification for murder, but that is quite a different

99 Note that scenario (v) is repeated verbatim from Horder's memorandum submitted to the Commons at the committee stage of the Coroners and Justice Act 2009 (House of Commons, Coroners and Justice Bill Committee, Memorandum submitted by Jeremy Horder, 3 February 2009, CJ 01). Horder notes that the scenario gives rise to multifarious difficulties: 'May the jury take into account the girls' pregnancies that are the result of the infidelity, in that these mean offspring born are related to D? Further, suppose V started an affair with one of the daughters before meeting/marrying D. Would D be able to rely on evidence of that affair, given that there was no obligation of fidelity to D at that stage? How far into the question whether the affair started before V met D should the court be prepared to go?'

100 Law Com. No 204, 2004 (n. 3) App. C.

101 In scenario H, interestingly, only 20 per cent of respondents viewed sentences of between five and ten years as appropriate, 24 per cent looked to 10–20 years, 20 per cent supported 20 years' imprisonment or more, 20 per cent life imprisonment with release on licence, and 16 per cent 'natural life' imprisonment.

102 Significantly, 52 per cent of respondents supported a sentence of between five and ten years in this regard.

103 Above (n. 98).

104 See Law Com. No 290, 2004 (n. 3) para. 3.144; and *Holmes v. DPP* [1946] AC 588, 600.

105 HL Deb. (n. 1) 1060 (Lord Thomas of Gresford).

thing from saying ... that the impact of another's sexual infidelity on a person's thoughts, actions and emotions should be disregarded entirely'.¹⁰⁶

These five examples serve to illustrate that the provocative nature of sexual infidelity may operate on a continuum of severity. There needs to be a more compartmentalised and prioritised approach to this sensitive area than simply a blanket inclusion or exclusion of things said or done which constitute sexual infidelity. As iterated previously, history demonstrates and modern justice demands, any review of loss of self-control as a partial defence necessarily involves the study of how levels of culpability can and should be judged according to contemporary social standards. Different gradations of culpability may be demarcated that reflect more directly attitudinal behaviours to loss of self-control and societal concerns *vis-à-vis* appropriate levels of mitigation. Killings prompted by male proprietorialness, 'sexual jealousy', 'envy', and premeditation by a cuckolded partner ought to be excluded from the ambit of this concessionary defence, but in equal measure cases of 'gross provocation' regarding sexual infidelity embracing excessive taunting, sexual humiliation, and a spontaneous fatal blow ought in appropriate cases to be allowed for consideration by fact-finders.¹⁰⁷ This will also mandate an inclusionary consideration of 'extreme' breaches of trust as identified by Horder in postulation (v). The tension between these parameters can be satisfied through invocation of the power of the trial judge to withdraw the matter of loss of self-control in sexual infidelity killings when there is no predicate on which a reasonable jury properly directed could conclude that it might apply. This is considered below in terms of pre- and post-Coroners and Justice Act 2009 reforms. Anglo-Scots law ought to operate a preliminary filter mechanism to cases engaging sexual infidelity where only circumstances of an extreme and exceptional character fall for jury consideration, and where a defendant can be partially exculpated in rare situations of excessive uncontrollable anger through 'gross' provocation:

It is a sad commonplace that when relationships break up there are often arguments and mutual recriminations. We think that it would be seldom that words spoken in such a situation could legitimately make the other party feel severely wronged, to the extent that a person of ordinary tolerance and self-restraint in such a situation might have used lethal violence; but there may be cases where one party torments another with remarks of an exceptionally abusive kind ... there are bound to be borderline cases.¹⁰⁸

The *Via Media*: Province of Judge and Jury in Sexual Infidelity Killings

The disparate treatment of heat of passion adjudications in reform and traditional states in the US reveals the importance of the province of judge and jury as arbiters of the partial defence. In traditional states the defence has steadily been precluded from fact-finder evaluation in respect of verbal taunts. The Coroners and Justice Act 2009 reveals significant changes in terms of 'objectification' of the defence of provocation, whereby s. 56(2)(a) abolishes s. 3 of the Homicide Act 1957, and s. 56(6) mandates, in effect, that the partial defence will only be left to the jury if sufficient evidence is adduced to raise an issue with respect to the defence on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

¹⁰⁶ HL Deb. (n. 1) 1060 (Lord Henley).

¹⁰⁷ Above (n. 104).

¹⁰⁸ Ibid.

This seismic shift in role of the trial judge arguably reflects an optimally balanced position for sexual infidelity killings, and ought to be determinative in Anglo-Scottish law.

Before the passing of s. 3 of the Homicide Act 1957 the trial judge was entitled to withdraw the issue of provocation from the jury on the ground that, even if the accused had himself been provoked, no reasonable man would have reacted in the way he did to the provocation. In the early eighteenth century the 'reasonable man' received little consideration, rather the courts adjudged the defendant's response according to the prevailing code of honour existing at the time.¹⁰⁹ Of the limited categories of provocative conduct that the trial judge would leave to the jury, there was 'no greater form of provocation'¹¹⁰ than a wife's adultery, whether the defendant was made aware orally or by catching his faithless spouse in flagrante delicto.¹¹¹ The wife was regarded *sub virga viri sui*,¹¹² and any act of infidelity was the 'highest invasion of property'.¹¹³ As an affront to a man's personal honour, failure to retaliate was deemed a 'social disgrace'.¹¹⁴ If a man were to respond by a sudden and fatal blow to his wife or her paramour, he was believed to be acting out of 'pure will' rather than immoral resolve.¹¹⁵ The courts considered that the 'injustice'¹¹⁶ of the wife's infidelity invoked the defendant's anger ('for jealousy is the rage of a man'¹¹⁷) and his retaliation 'restored the balance of justice'.¹¹⁸ Notwithstanding the prevailing preoccupation with female fidelity in the early eighteenth century, by the beginning of the nineteenth century trial judges were unprepared to leave provocation to the jury where a man killed following his unfaithful inamorata's admission of illicit intercourse.¹¹⁹ It was more difficult for an unmarried man to claim that his beau's clandestine encounter constituted an invasion of property. Similarly, the courts refused to allow the defence to the jealous man who killed following his lover's flippant remark that she was going to leave him for another man.¹²⁰ As emphasis on the 'reasonable man'¹²¹ requirement became more prominent, Viscount Simon, in *DPP v. Holmes*, identified a shift in normative expectations of the marital relationship in the context of sexual perfidy:

we have left behind us the age when the wife's subjection to her husband was regarded by the law as the basis of the marital relation ... Parliament has now conferred on the aggrieved wife the same right to divorce her husband for unfaithfulness alone as he holds against her, and neither, on hearing

109 Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992) 27.

110 *Mawgridge* [1707] Kel J 119; 84 ER 1107, 1114-15 (Lord Holt CJ).

111 *Ibid.*; and see *Rothwell* (1871) 12 Cox CC 145; and *R v. Jones* (1908) 72 JP 215.

112 The government contended that specifically excluding sexual infidelity under the new loss of control defence 'would send a message to the country at large that women are not the property of men'; HL Deb. (n. 21) 840 (per Lord Thomas of Gresford).

113 *Mawgridge* (n. 110).

114 Law Com. No 290, 2004 (n. 3) App. G, para. 76.

115 Horder, *Provocation and Responsibility* (n. 109) 8.

116 Aristotle, *Nicomachean Ethics*, Book V, 8, in Ashworth, 'The Doctrine of Provocation' (1976) 35 Cambridge Law Journal 292.

117 *Mawgridge* (n. 110).

118 Marc Ancel, 'Le Crime Passionnel' (1957) 73 Law Quarterly Review 36, 37.

119 *Palmer* [1913] 2 KB 29; 82 LJ KB 531; 29 TLR 349; 8 Cr App R 207.

120 The trial judge in *R v. Alexander* (1913) 9 Cr App R 139, 141, declined to leave provocation to the jury where the defendant killed his girlfriend after she made a flippant remark about leaving him for another man.

121 *Welch* (1869) 11 Cox CC 336.

an admission of adultery from the other, can use physical violence against the other which results in death and then urge that the provocation received reduces the crime to mere manslaughter.¹²²

Trial judges began to consider that a reasonable man only lost his self-control when he found his wife in the act of adultery and not when he had been told of it; that a reasonable man who was provoked by fists did not retaliate with a knife but only with fists; that reasonable men would not lose their self-control when taunted about a peculiar characteristic, for example impotence, since reasonable men did not possess that characteristic; and reasonable men would cool off after a certain period of time and regain their self-control.¹²³

In so far as trial judges before 1957 were entitled to withdraw the issue altogether from the jury on the basis of an objectified standardisation, s. 3 of the Homicide Act removed that power, and reflected an important shift in momentum. Post-1957 the judge had to leave the issue to the jury if evidence prevailed that the accused (subjectively) was provoked to lose his self-control. In *Doughty*,¹²⁴ for instance, the Court of Appeal determined that where evidence persisted that the accused had been provoked by the crying of his 17-day-old child, the trial judge was consequentially under an obligation to leave the defence of provocation to the jury. The changes effected by s. 3 were of fundamental importance because this section: (1) established that words alone may constitute sufficient provocation if the jury decided that they would have provoked a reasonable man;¹²⁵ (2) treated the 'mode of resentment' or proportionality rule only as a factor, not a prerequisite, in judging whether a reasonable man would have acted as the actor did;¹²⁶ (3) took away the power of the judge to withdraw the defence from the jury on the grounds that there was no evidence on which the jury could find that a reasonable man would have been provoked to do as the defendant had done;¹²⁷ (4) authorised the defence to be used if a third person, not the victim, was the provoker;¹²⁸ and (5) removed the power of the judge to dictate to the jury what were the characteristics of the reasonable man.¹²⁹ The role of the jury was integral to determining the availability of the provocation defence, and judicial recognition of the primacy of the jury pre-2009 reforms was provided in *Rossiter*¹³⁰ by Russell LJ, who opined:

The emphasis in that section is very much on the function of the jury as opposed to the judge. We take the law to be that wherever there is material which is capable of amounting to provocation, however tenuous it may be, the jury must be given the privilege of ruling on it.¹³¹

The pre-existing law, following *Rossiter* and *Stewart*,¹³² established that even where defence counsel in a sexual infidelity case did not raise the issue of provocation, and even if they preferred

¹²² *Holmes* (n. 104) 600.

¹²³ See, generally, Martin Wasik, 'Cumulative Provocation and Domestic Killing' [1982] Criminal Law Review 29.

¹²⁴ (1986) 83 Cr App R 319.

¹²⁵ See *Phillips v. The Queen* [1969] 2 AC 130.

¹²⁶ See *Brown* [1972] 2 QB 229; and see, generally, Reed and Fitzpatrick (n. 81).

¹²⁷ *Baillie* [1995] 2 Cr App R 31.

¹²⁸ *Davies* [1975] QB 691.

¹²⁹ Reed and Fitzpatrick (n. 81).

¹³⁰ (1992) 95 Cr App R 326; and see, further, *Van Donegen and Van Donegen* [2005] EWCA Crim 1728.

¹³¹ *Ibid.*, 333.

¹³² [1995] 4 All ER 999.

not to because it inconsistently juxtaposed with and detracted from the primary defence, the judge had to leave the issue to the jury to decide if *any* material existed which suggested that the accused may have been provoked. This *prima facie* obligation accrued unless no evidence emerged from whatever source, suggesting a reasonable possibility that the defendant *might* have lost his self-control due to words or deeds of another, or a combination of the two.¹³³ This was affirmed by the House of Lords in *Acott*, where a 48-year-old defendant, financially dependent upon his mother and treated like a child, was charged with her murder, but claimed her injuries were sustained as a result of a fall and his unskilled efforts to resuscitate her. A loss of self-control caused by fear, panic, sheer bad temper or circumstances (for example, a slow-down of traffic due to snow) was not enough. There had to be some evidence, albeit slight, tending to show that the killing might have been an uncontrolled reaction to provoking conduct rather than an act of revenge. A frenzied attack was more likely to point to a sudden and temporary loss of self-control, than would evidence of a solitary wound. Lord Steyn concluded in *Acott*¹³⁴ that what was required was a *specific provoking event*; it was insufficient that the issue of loss of self-control may have simply been raised by the prosecution in cross-examination of the defendant. An accused who reacted with excessive anger to ocular or verbal identification of a partner cheating upon them easily met the threshold standard in terms of provoking events; the trial judge consequently was emasculated from removing inappropriate cases from jury consideration and outcomes were determinative on empathetic or sympathetic fact-finders.

A new *via media* applies in the Coroners and Justice Act 2009 that ought to have rendered nugatory the late insertion of a sexual infidelity exclusion provision. The trial judge has become emperor or empress of the qualifying threshold for jury consideration of loss of self-control. This new approach, an objectification of old law, strikes the perfect balance in that the decision to withdraw the issue from the jury is one for the judgment of the trial judge following determination from counsel. Their role is not straitened and constricted, as in Scotland and reform states in the US, by unduly liberal perspectives to infidelity and breach of intimacy whether or not appropriate and legitimate. As stated by the Law Commission in argument: 'Our approach has been to seek to set out broad principles, to rely on the judge to exercise a judgment whether a reasonable jury could regard the case as falling within those principles and then to rely on the jury to exercise its good sense and fairness in applying them.'¹³⁵

In many respects the position adopted in s. 54(6) of the Coroners and Justice Act 2009 regarding the province of judge and jury, and taunts of a sexual nature, might have restored our law to the position existing back in 1946 when *Holmes v. DPP*¹³⁶ was determined. It will be recalled that the accused killed his wife after a confession of her adultery by a blow to the head with a blunt instrument and through strangulation. Viscount Simon in the House of Lords clearly stated that, 'a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter';¹³⁷ and more pithily he added, 'Even if Iago's insinuations against Desdemona's virtue had been true, Othello's crime was murder and nothing else.'¹³⁸ To this a caveat would be extended as Viscount Simon added (*obiter*) that in circumstances of gross provocation,

133 Ibid., 1007.

134 [1997] 1 All ER 706.

135 Law Com. No 290, 2004 (n. 3) para. 3.150.

136 *Holmes* (n. 104); and note discussion of this issue in a different context in Horder, 'Reshaping the Subjective Element in the Provocation Defence' (n. 15) 132. See consideration above of the historical development of provocation as a defence vis-à-vis sexual infidelity killings.

137 *Holmes* (n. 104) 599.

138 Ibid., 598.

'of a most extreme and exceptional character' the duty would rest upon the trial judge to direct the jury accordingly as to whether the partial defence was applicable.¹³⁹ Excessive taunting or extreme breaches of trust, even in sexual infidelity cases, as in scenario (iv) and (v) postulated above, should fit within this limited ambit with significant responsibilities on a trial judge whose decision whether or not to withdraw loss of self-control ought to be required to be supported by reasons. Unfortunately, the Law Commission's further proposition,¹⁴⁰ that consideration be given to the creation of an interlocutory appeal against a judge's ruling that the defence should not be put to the jury in circumstances of partially justifiable anger, fell on deaf ears, and is not within the Coroners and Justice Act 2009. This interlocutory appeal system in cases of sexual infidelity killings could have facilitated an optimal *via media* in exceptional cases of ocular or verbal taunts of infidelity. It would allow a contemporary standardisation of circumstances, albeit limited, for normative evaluation by fact-finders in a compartmentalised and objectified delineation.

The rejection of things done and said constituting sexual infidelity within the purview of the Coroners and Justice Act 2009 may, in any event, simply have closed one door and one partial defence for the accused. It is questionable what the government were really seeking to achieve with this specific exclusion. The breadth of this exclusion is also up for debate in terms of disentanglement of 'infidelity' from other circumstances of taunts regarding inadequacy and disaffection.

By sleight of defence hand the new model template may presciently be to utilise evidence of grossly provoking conduct to support a denial of the *mens rea* element for murder.¹⁴¹ This may be predicated on the argument that because of the 'victim's' outrageously provocative behaviour in terms of excessive taunting of infidelity this caused the accused to act in spontaneous anger, with the outcome that she lacked any intention to kill or cause grievous bodily harm at the commission point of the fatal action. The whole history of provoking conduct may be put in evidence to this issue of fault, and an effort to persuade sympathetic or empathetic fact-finders.¹⁴² It is disappointing that, rather than the piecemeal iterations of the 2009 reforms, a thorough review and legislative reform of all aspects of homicide liability has not been engendered. This root and branch reform needs to finely tune levels of criminal responsibility on a hierarchical structure addressing differential culpability, and on occasions, appropriately exculpating or mitigating defendant's liability when acting in demarcated emotional states of mind with reduced control expectations.¹⁴³

¹³⁹ Ibid., 600.

¹⁴⁰ Law Com. No 304, 2006 (n. 3) para. 5.16 asserting: 'This appeal should be permitted only before the trial (the basis of the defence should be considered at a pre-trial hearing under modern case management procedures) so that the trial itself is not substantially delayed by the use of the interlocutory procedure. The Higher Court Judges' Homicide Working Party could see no special problems arising from the provision of such an appeal.'

¹⁴¹ Ibid., paras 5.71–5.72.

¹⁴² Ibid. Note that the Law Commission stressed: 'we believe that it is important to highlight what will be the continuing evidence of all kinds of provocation to murder cases, whether or not the formal defence of provocation is itself more severely restricted than we are already suggesting that it should be'.

¹⁴³ Note the strident criticism presented by Lord Thomas of Gresford in this regard: 'The Government have not followed its [the Law Commission's] recommendations for wholesale reform of the law relating to homicide into a three-tier system ... they have totally undermined the coherence of the Law Commission's proposals in a way that can only bring further chaos and difficulty in this field'; HL Deb. (n. 21) 837.

Publication (vi)

‘Political rhetoric or principled reform of loss of control? Anglo-Australian perspectives on the exclusionary conduct model’ *Journal of Criminal Law* (2013) 77 (6), 512- 542.

Journal of Criminal Law

2013

Political rhetoric or principled reform of loss of control? Anglo-Australian perspectives on the exclusionary conduct model

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Subject: Criminal law

Keywords: Adultery; Conduct; Loss of control; Murder; New South Wales; Provocation; Qualifying trigger

Legislation: Coroners and Justice Act 2009 (c.25) s.54, s.55, s.56

Case: R. v Clinton (Jon-Jacques) [2012] EWCA Crim 2; [2013] Q.B. 1 (CA (Crim Div))

**J. Crim. L. 512* [The exclusionary conduct model] seems to imply the extraordinary proposition that no one—including husbands and wives—has any right to expect fidelity or lifelong commitment in a relationship; and that marital betrayal or desertion, even without notice and announced in a way that is viciously cruel or taunting, should never give rise to any reaction other than a cool response of ‘I wish you the best in your freely chosen autonomous decision about your personal and sexual life.’ It seems perverse to continue to allow the defence for all sudden provocations other than those that touch on intimate relationships including marriage. This is unrealistic and reflects an extreme ideological, individualistic view of marriage and of personal sexual relationships.¹

Abstract The New South Wales Legislative Council Select Committee published its report on the partial defence of provocation in April 2013. The Committee's recommendations are closely modelled on the framework and rationale of the loss of control defence under ss 54-56 of the Coroners and Justice Act 2009, with significant exceptions designed to circumvent the difficulties associated with the novel terminology. Interestingly, the Committee advocates the adoption of an exclusionary conduct model, despite the problems associated with s. 55(6)(c), which specifies that sexual infidelity is to be disregarded for the purposes of the concessionary mitigation. The Committee asserts that a carefully worded exclusionary conduct model would serve to restrict the partial defence whilst avoiding the issues which have manifested themselves at appellate court level in England and Wales. Irrespective of the wording, specific prohibitions which focus on the conduct of the victim are unrealistic in **J. Crim. L. 513* that they fail to account for the multitudinous and interconnected nature of loss of control/provocation claims. Nevertheless, exclusionary conduct models which concentrate on the conduct of the victim ought to be distinguished from clauses which focus on the defendant's actions. If the defendant undertakes to cause the victim to respond in a manner for the purpose of providing an excuse to use violence it is clear that the defence ought not to apply. Similarly, where a defendant becomes voluntarily intoxicated, it may be appropriate to exclude that intoxication from consideration when making the objective assessment as to whether an ordinary/reasonable person would have reacted as the defendant did in the circumstances. In this context, explicit legislative exclusions do have the potential to prevent unnecessary appellate litigation, but only in limited circumstances.

Keywords Australia; Coroners and Justice Act 2009; Exclusionary conduct models; New South Wales; Loss of control; Sexual infidelity

The New South Wales Legislative Council Select Committee² published its report on the partial defence of provocation in April 2013. The Report's recommendations are modelled closely on ss 54-56 of the Coroners and Justice Act 2009 as implemented in England and Wales,³ albeit with significant exceptions designed to circumvent the intractable flaws associated with the novel terminology.⁴ The NSWLCSC placed particular emphasis on avoiding the problems arising from the divisive sexual infidelity prohibition contained within s. 55(6)(c) of the 2009 Act.⁵ Notwithstanding these concerns, the NSWLCSC's recommendations are predicated on an exclusionary conduct model which would preclude the mitigation to defendants who ‘respond to a non-violent sexual advance by the victim’⁶ and the defence would remain unavailable, ‘other than in cases of a most extreme and exceptional character’ in several specified domestic situations including, *inter alia*, where the provocation is ‘based on anything done by the deceased or anything the defendant believes the deceased has done’ to end or change the nature of the relationship.⁷

This comparative extirpation provides a timely and critical reappraisal of the efficacy of excluding specific types of behaviour for the purposes of loss of control/provocation claims. Less than two years after the implementation of the loss of control defence under ss 54-56 of the 2009 **J. Crim. L. 514* Act, the Court of Appeal in *R v Clinton*⁸ effectively rendered the controversial sexual infidelity prohibition nugatory where the defendant alleges that the victim's infidelity combined with other factors caused him to lose his self-control and kill. The ruling mandates, in effect, that sexual infidelity may be considered relevant to a loss of control claim where it is not the *only* factor to be relied upon for the purposes of establishing an ostensible qualifying trigger. In practice, it is likely that evidence will be adduced to prove that a number of factors contributed to the defendant's loss of self-control and as a result the exclusionary clause has effectively become a 'dead letter'.⁹ Judicial law-making appears to have triumphed over the provisions of the statute in this regard.

These problems were highlighted in the NSWLCSC's report on the partial defence of provocation. Fitz-Gibbon asserted that '*Clinton* ... provides ... a clear example of the ineffectiveness of exclusionary based reform models' and accordingly, 'a warning to the Committee to steer clear of implementing this model of reform in NSW'.¹⁰ It was similarly acknowledged that the exclusionary model is unlikely to succeed because the victim's conduct 'will always be redefined in a way that allows it to fall within the scope of the defence'.¹¹ Notwithstanding these reservations, the Committee considered that a carefully drafted exclusionary clause would suitably restrict the availability of the partial defence whilst avoiding the problems experienced in England and Wales.¹²

The lessons learned in England and Wales, however, strongly suggest that specific prohibitions needlessly complicate the partial defence and it is contended that s. 55(6)(c) of the Coroners and Justice 2009 is irretrievably defective. Exclusionary clauses which arbitrarily restrict loss of control/provocation claims based on isolated aspects of the victim's behaviour fail to acknowledge the interconnectivity between events and their context. The victim's conduct is beyond the control of the defendant and will often involve a multiplicity of factors. An all-legislative amendment delimiting the defence based upon the victim's conduct, such as that recommended in NSW,¹³ carries with it the potential to cause injustice. That is not to say that any aspect of the victim's conduct ought to satisfy the concessionary mitigation, rather the trial judge should be afforded discretion in determining whether the victim's conduct justifies leaving the partial defence for fact-finder evaluation.¹⁴

**J. Crim. L. 515* Exclusionary conduct models which concentrate on the conduct of the victim ought to be differentiated from provisions which focus on the defendant's actions. If the defendant undertakes to cause the victim to respond in a manner for the purpose of providing an excuse to use violence, it is clear that the defence ought not to apply on grounds of the defendant's prior fault in instigating the provocative conduct. Similarly, where a defendant acts out of a considered desire for revenge he or she should be regarded morally responsible for his or her conduct. In cases where a defendant becomes voluntarily intoxicated, it may be appropriate to exclude that intoxication from consideration when making the objective assessment as to whether an ordinary/reasonable person would have reacted as the defendant did in the circumstances.¹⁵ In this context, explicit legislative exclusions do have the potential to prevent unnecessary appellate litigation, but only in limited circumstances and within the boundaries of preventing individual culpability.

The loss of control defence

There are three essential components to ss 54-56 of the Coroners and Justice Act 2009. The first requires the killing to have resulted from the defendant's loss of self-control.¹⁶ The loss of control need not be sudden,¹⁷ but the defence will not operate where the defendant has acted in a considered desire for revenge.¹⁸ The second component necessitates that the loss of control is attributable to at least one of two qualifying triggers, or a combination of both. The first qualifying trigger is satisfied by a thing said or things done or said (or both) which constituted circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged.¹⁹ The second qualifying trigger requires the defendant to fear serious violence from the victim against the defendant or another identified person.²⁰ The mitigation is unavailable to the defendant who, looking for trouble to the extent of inciting or exciting violence, loses his control²¹ and the fact that a thing done or said constituted sexual infidelity is to be disregarded.²² The final component requires the jury to assess whether a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted in the same or a similar way.²³ The defendant's circumstances **J. Crim. L. 516* extends to 'all' of the circumstances except those bearing on his general capacity for tolerance and self-restraint.²⁴

Attribution of preventing fault

The exclusionary clauses operate to preclude the partial defence in cases of self-induced provocation²⁵ and where the killing was borne out of 'a considered desire for revenge'.²⁶ As far as the victim's conduct is concerned, the legislation stipulates that sexual infidelity is to be disregarded for the purposes of the qualifying triggers. There is a significant difference between prohibiting the availability of the partial defence on the basis of the defendant's actions as opposed to the conduct of the victim. In the former case, the defendant has acted in a way which renders it appropriate to preclude the concessionary mitigation. For example, D formed an intention to kill V. D approached V in a nightclub. Knowing that V's wife had recently left him, D mercilessly taunted V. V responded saying, 'I'll kill you!' and advanced towards D, whereupon D hit V over the head with a bottle, from which V subsequently died. In this case, D is unable to rely on the loss of control defence, based on a fear of serious violence or otherwise, because D instigated V's conduct for the purpose of using it as an excuse to use violence. D's prior fault in causing V to respond in a provocative manner effectively precludes the availability of the partial defence.²⁷

Similarities may be drawn between the defendant who incites conduct for the purpose of using it as an excuse to use violence and the intoxicated defendant. An individual offender who drinks copious amounts of alcohol in order to provide Dutch courage to commit any designated offence, specific or basic, is regarded as morally culpable for his actions.²⁸ Lord Denning in *Attorney-General for Northern Ireland*²⁹ stated:

If a man, whilst sane and sober, forms an intention to kill and makes preparation for it knowing that it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on his self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state **J. Crim. L. 517* that he was incapable of an intent to kill. So also, when he is a psychopath he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do.³⁰

Liability is constructed on the basis of the defendant's prior fault in becoming voluntarily intoxicated for the purpose of committing the elected offence.³¹ In the same regard, evidence of voluntary acute intoxication on behalf of the defendant is irrelevant when making the objective assessment as to whether an ordinary/reasonable person would have reacted as the defendant did in the circumstances.³² In *R v Asmelash*,³³ the Court of Appeal assessed whether the voluntary consumption of alcohol could fall within the 'defendant's circumstances' for the purposes of the partial defence of loss of self-control.³⁴ The Lord Chief Justice cited with approval the initial trial judge's direction which required jurors to ignore the defendant's intoxication and apply *Majewski*³⁵ standardisations:

Are you sure that a person of [defendant's] sex and age with a normal degree of tolerance and self-restraint and in the same circumstances, *but unaffected by alcohol*, would not have reacted in the same or similar way?³⁶

**J. Crim. L. 518* The effect is that voluntary intoxication does not preclude the availability of the loss of control defence, rather the defendant's conduct is assessed according to the standards of the ordinary sober person.³⁷ This approach is clearly aligned with the English Law Commission's recommendation that atypical mental states, such as intoxication and irritability, should be omitted from consideration on the basis that they constitute factors which bear on the defendant's general capacity to exercise adequate self-control.³⁸ The Court of Appeal asserted that the term 'unaffected by alcohol' should be implied into the loss of control defence, otherwise the floodgates would allow every intoxicated defendant to claim:

I must be judged against the standards of other violently disposed drunken people even though I may be like a lamb when I am sober.³⁹

Voluntary acute intoxication on the part of the defendant is, in this respect, impliedly excluded from consideration when assessing whether the ordinary person would have behaved as the defendant did in the prevailing circumstances. The *Asmelash* litigation might have been avoided had Parliament enacted a specific exclusionary clause akin to that recommended by the NSWLCSC, which provides that 'where a defendant is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, a justifiable sense of being seriously wronged caused by that intoxication

or resulting from a mistaken belief occasioned by that intoxication is to be disregarded'.⁴⁰ This clause would align provocation with the partial substantial impairment of the mind defence and is likely to be subject to s. 428A of the Crimes Act 1900.⁴¹

[The NSWLCSC's] reason for expressly excluding self-induced intoxication from consideration in relation to the partial defence, is essentially, to be consistent with existing legislative policy on the admissibility of evidence of intoxication in relation to criminal offences ... That policy is said to be based on the view that it is unacceptable to excuse otherwise criminal conduct because the accused is suffering from self-induced intoxication, ***J. Crim. L. 519** and that people who become voluntarily intoxicated should be held responsible for their actions.⁴²

The recommendation could be enhanced by specifically outlining whether it should apply to acute intoxication only and/or by specifying any exceptions to the exclusion, for example, alcohol dependence syndrome or gradations of harmful drug/alcohol use.⁴³ In *Asmelash*, their Lordships noted that a nuanced approach should apply where the defendant suffers from alcohol dependence syndrome and is ruthlessly taunted regarding that condition (to the extent that it amounts to a qualifying trigger) in which case the syndrome might constitute part of the circumstances for consideration.⁴⁴ This ruling appears to imply that alcohol dependence syndrome may remain relevant, notwithstanding the voluntary consumption of alcohol, in that jurors would be required to consider whether an ordinary person 'of the defendant's sex and age with a normal degree of tolerance and self-restraint and suffering from alcohol dependence syndrome would have acted in the same or a similar way'. Despite the obvious problems associated with requiring jurors to answer hypothetical questions of this nature, this nuanced approach reflects the general consensus in English law that alcohol dependence syndrome potentially impacts upon the defendant's level of criminal responsibility.⁴⁵

It is not atypical for evidence of a defendant's intoxication to be omitted from consideration when assessing whether a particular defence ought to apply.⁴⁶ Nor is it uncommon for a defence to be precluded to the defendant who voluntarily places himself into a situation which he knows, or ought to know, may result in him becoming involved in criminal activity.⁴⁷ In this respect, explicit and implied exclusionary models which focus on the conduct of the defendant may be cogently aligned with other areas of substantive criminal law. It is inapposite to afford a defence (and/or to take account of a defendant's voluntary intoxication) when the defendant has culpably fostered a situation in order to use violence.

***J. Crim. L. 520 Sexual infidelity plus**

The sexual infidelity prohibition is logically distinct from the foregoing exclusionary provisions in that it focuses on the conduct of the victim. Specific prohibitions of this nature are more problematic since the defendant is not responsible for the conduct of the victim and a variety of factors may combine to cause the defendant to lose self-control. An absolute statutory exclusion aimed towards particular forms of conduct has the potential to produce harsh and unjust results. The Law Commission advised against the implementation of s. 55(6)(c) on grounds that the policy objective underpinning the exclusionary conduct model was unclear and that it would unnecessarily complicate the partial defence.⁴⁸ The rationale for the delimitation is that 'it is unacceptable for a defendant who has killed an unfaithful partner to rely on that unfaithfulness to try to escape a murder conviction'.⁴⁹ The government's approach in this context erroneously assumes that judges and juries would accept a loss of control claim predicated on the victim's alleged sexual perfidy alone.⁵⁰ Case law demonstrates that the concession to human frailty underpinning the partial defence only extends so far, and that in contemporary society judges and jurors deem it inappropriate to afford a partial defence on grounds of a partner's actual or suspected infidelity.⁵¹ In light of these observations, the sexual infidelity prohibition is unnecessary since unmeritorious cases are invariably filtered out by judges and jurors.

The 1975 case of *R v Davies (Peter)*⁵² highlights that jurors are disinclined to allow provocation even in cases where the trial judge has been ***J. Crim. L. 521** generous to the defendant. The defendant killed his wife after she commenced a relationship with another man, by shooting her as she left her place of work to meet her lover who was waiting outside. The defendant was charged with murder after the jury rejected provocation based upon the wife's conduct, i.e. leaving the defendant and commencing a relationship with another man. The defendant appealed on the basis that the judge had misdirected the jury in failing to direct that the actions of the wife's lover could be taken into account for the purposes of the provocation defence. The Court of Appeal asserted that since the judge had directed the members of the jury that they could consider the wife's conduct over the

previous year as acts of provocation, which was generous to the defence, the jury, in the circumstances of the case, could not have separated the wife's actions from those of her lover and the failure to direct the jury that the lover's presence at the victim's workplace amounted to provocation would not have altered their view that it was a premeditated killing. This is one example in a plethora of cases where jurors have refused to allow provocation claims predicated on the victim's actual or alleged sexual infidelity. In this respect, the government's vociferous campaign against sexual infidelity has been heavily criticised as taking advantage of the emotions evoked as a result of sexual infidelity killings. It has been suggested that the exclusionary clause is nothing more than 'nonsensical rhetoric in an area of law of great sensitivity'⁵³ since provocation cases based on sexual infidelity *per se* have been rejected by jurors for many years.

The government also failed to consider the impact of the higher threshold test introduced via the new qualifying triggers under ss 54-55 of the Coroners and Justice Act 2009 when it enacted the sexual infidelity prohibition. In practice s. 55(6)(c) adds very little to the partial defence in cases where the *only* provocative conduct to be relied upon is the victim's infidelity since the anger/fear trigger(s) operate to exclude such claims. The concessionary mitigation requires that the defendant lost self-control in response to the fear and/or anger trigger(s). During parliamentary debate Mr Llywyd provided the following scenario in which the provocative conduct pertains to sexual infidelity alone: 'V was bragging about having sexual relations with D's wife. D went out, bought a knife and stabbed V to death' ('Sexual infidelity *per se*').⁵⁴ It is clear that the defendant in this example did not fear *serious* violence and he could not have experienced a *justified* sense of being *seriously* wronged. The defendant's claim is filtered out by the higher threshold required by the new qualifying triggers.

The foregoing principle was applied in the case of *R v Dawes, Hatter and Bowyer*.⁵⁵ H fatally stabbed his estranged partner, B, at her home in *J. Crim. L. 522 Sheffield. H and B had been in a relationship for about a year, when B indicated that she intended to return to her home in Maidstone where she had commenced a sexual relationship with a man called Dave. On the evening of the fatal attack, H was seen entering B's home via an upstairs window. An argument shortly followed, which was loud enough for the neighbours to hear. One neighbour gave evidence that he had heard H say, 'You are not going. I'm not letting you go'. A second witness testified that she heard H ask, 'Have you shagged Dave?' to which B replied 'No, I've only kissed him'. Shortly thereafter, H stabbed V in the chest and wrist, killing her. H was subsequently charged with murder. The prosecution contended that B was the victim of a premeditated killing. The defence asserted that the victim's death was a dreadful accident.

Judge Goldsack refused to leave the partial defence to the jury on grounds that the things said or done 'did not come anywhere near' founding 'circumstances of an *extremely grave* character' nor could they have caused the defendant to have 'a *justified* sense of being seriously wrong'.⁵⁶ The requirements of the qualifying trigger operated to preclude the partial defence in this case (as the Law Commission had intended)⁵⁷ without the need for recourse to the sexual infidelity prohibition. The 'presence or otherwise of a qualifying trigger' requires objective evaluation and 'is not defined or decided by the defendant and any assertions he may make in evidence, or any account given in the investigative process'.⁵⁸ The requirements of the new qualifying triggers effectively raise the bar for defendants who kill in anger and accordingly it is unlikely that sexual infidelity *per se* would ever satisfy the anger trigger.⁵⁹

To suggest that the fact of a break-up of a relationship could amount to circumstances of an *extremely grave* character or that it would entitle the aggrieved party to feel a *justifiable* sense of being *seriously wronged* would be to ignore the normal meaning of these words. It would also result in the defence of loss of control being left to the jury in almost every case where one partner to a relationship kills the other, which was clearly not Parliament's intention.⁶⁰

In order for the concessionary mitigation to apply, it is insufficient for the defendant to have a sense of being seriously wronged. The partial *J. Crim. L. 523 defence requires that the circumstances were of an extremely grave character and that the defendant's sense of being wronged by them is justifiable. Similarly, it is difficult to envisage a situation where the defendant fears *serious* violence as a result of sexual infidelity. There was no need to introduce an explicit legislative provision in order to filter out cases like that of *Hatter*. Notwithstanding these observations, the government felt that it was 'important to set out the position precisely and uncompromisingly namely that sexual infidelity is not the kind of thing done that is ever sufficient on its own to found a successful plea of loss of control'.⁶¹ The sexual infidelity prohibition may have more to do with political rhetoric than principled reform in this regard. In reality, it will only be in rare cases that sexual infidelity *per se* will be relied upon in support of a qualifying trigger since 'daily experience in both criminal and family courts demonstrates

that breakdown of relationships, whenever they occur, and for whatever reason, is always fraught with tension and difficulty'.⁶²

In a small minority of cases, it may not be too onerous to disentangle sexual infidelity from a particularly severe form of provocative conduct.⁶³ The scenario of a defendant who returns home to find her husband raping her child, whereupon she loses control and kills him⁶⁴ ('Rape of a child') provides a fundamental example of this type of case. The sexual infidelity *per se* is arguably irrelevant when situated in the context of the rape. There is no question that the revelation that your child has been raped, whether from hearing what is happening or by catching the perpetrator in the act, is one of the most serious forms of provocative conduct, regardless of whether it was the act of a spouse or a stranger. If fact-finders were asked to disregard sexual infidelity for the purposes of the partial defence, this is unlikely to affect the outcome of the case. The jury will simply be required to determine whether finding your/a child being raped is sufficiently provocative to satisfy the 'seriously wronged' trigger.⁶⁵ The exclusion of sexual infidelity as a qualifying trigger is an unnecessary requirement in cases of this context.

In the vast majority of cases, however, a combination of factors including the victim's unfaithfulness will contribute to the defendant's loss of self-control. At the very least, the sexual infidelity will provide a context to the provocative conduct of the victim. It is highly artificial, if not impossible, to expect fact-finders to evaluate whether an ostensible qualifying trigger is satisfied based upon the victim's conduct whilst at the same time requiring them to disregard the victim's sexual infidelity. ***J. Crim. L. 524** The following scenario is demonstrative of the problems associated with asking jurors to engage in this form of mental gymnastics:

D is abused by her husband (V) over a long period, at the end of which they are reconciled. V says that he will moderate his behaviour and promises to be faithful to D in the future. D comes home the following weekend to find V *in flagrante* with his lover. V tells D that the marriage is now at an end, and D kills him. ('the abused wife')⁶⁶

This postulation draws on both the 'fear' trigger (in the context of domestic abuse) and the 'seriously wronged' trigger (the abuse coupled with the revelation that the marriage was at an end). It is not simply V's threat to leave, but the 'cumulative impact'⁶⁷ of the domestic abuse, the promises, and V's sexual infidelity which contribute to D's loss of self-control. These contributory qualifying and non-qualifying triggers combine to cause D to lose her self-control. The omission of sexual infidelity from the remaining factors results in D claiming that the final straw, the revelation that her husband was going to leave, caused her to lose self-control.⁶⁸ A number of commentators have asserted that this is the correct approach and that the domestic violence *per se* would have to satisfy the qualifying trigger.⁶⁹ For some the 'repeated beatings and immense fear' suffered by the battered woman will be sufficient to raise the fear trigger and the main obstacle for battered women is the 'loss of control' requirement.⁷⁰ This observation fails to address the link between the loss of control requirement and the qualifying trigger. The sexual infidelity is 'an important and relevant component of the cocktail of events' that combined to make the defendant lose control⁷¹ and to exclude it from fact-finder evaluation is to omit an important narrative which may impact upon whether the defence succeeds or fails.⁷² Fact- ***J. Crim. L. 525** finders are charged to evaluate whether D had truly lost control or was acting in a considered desire for revenge,⁷³ in this particular scenario the sexual infidelity represents an important factor in D's loss of self-control: 'how can we exclude the deepest feelings and passions, the breach of trust and the breach of faithfulness from our considerations?'.⁷⁴ Although some have criticised the use of extreme examples as 'watering down the law', it is submitted that this unnecessary exclusion has the potential to cause grave injustice in a small number of cases⁷⁵ and this is precisely why such examples ought to be considered.⁷⁶

R v Clinton

This was recognised by the Court of Appeal in the case of *R v Clinton*⁷⁷ which adopted a remarkably inclusionary approach to the application of the sexual infidelity prohibition. The defendant, C, was devastated when his wife, V, left him and their two children to begin a 'trial separation'. Both parties had a history of clinical depression and their marriage was fraught with financial difficulties. Two weeks after leaving, V informed C that she had been having an affair with a man (X) whom she had met via Facebook. The following day, C accessed several suicide websites and V's Facebook account where he 'tortured' himself over photographs of V and X. V's relationship status indicated that she was 'separated' and 'open to offers' and C found sexually explicit photographs which confirmed the affair. When confronted, V informed C that she had engaged in sexual intercourse with five

different men, going into graphic detail. V subsequently noticed that C had accessed suicide websites and told him that 'it would have been easier if you had, for all of us', whereupon C picked up a wooden baton and struck V repeatedly before strangling her with a ligature.⁷⁸

The facts gave rise to three contributory triggers: the sexual infidelity; the taunts regarding C's suicide plan; and the fear that C would be required to care for the children on his own. At first instance, the trial judge advocated that the comments pertaining to V's sexual infidelity were to be disregarded and that the remaining evidence was insufficient to satisfy the 'seriously wronged' and/or 'fear' triggers. On appeal, the **J. Crim. L. 526* Court of Appeal asserted that sexual infidelity can be considered as one of the circumstances which might have caused a person with a normal degree of tolerance and self-restraint to lose control. Fact-finders were required to assess whether the taunts were sufficient to cause the defendant to lose self-control in circumstances where the defendant was angered by his wife's sexual infidelity. Lord Judge CJ stated:

Our approach has, as the judgment shows, been influenced by the simple reality that in relation to the day to day working of the criminal justice system events cannot be isolated from their context ... [T]o seek to compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole is ... unrealistic and carries with it the potential for injustice ... we do not see how any sensible evaluation of the gravity of the circumstances or their *impact on the defendant* could be made if the jury, having, in accordance with the legislation, heard the evidence, were then to be directed to excise from their evaluation of the qualifying trigger the matters said to constitute sexual infidelity, and to put them into distinct compartments to be disregarded. In our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections 55(3) and (4), the prohibition in section 55(6)(c) does not operate to exclude it.⁷⁹

The ruling mandates, in effect, that if an admissible trigger may be present, the evidence relating to sexual infidelity arises for consideration as part of the context in which to evaluate that trigger and whether the statutory ingredients for that particular trigger have been satisfied.⁸⁰ In this case, the sexual infidelity provided more than a contextual narrative. Indeed, the taunts plus V's sexual infidelity could be sufficient to satisfy the 'seriously wronged' trigger, despite the fact that the taunts *per se* were deemed inadequate to fulfil that aspect of the partial defence; the combination of 'matters relied on as a qualifying trigger, evaluated in the context of the evidence relating to V's sexual infidelity, and examined as a cohesive whole, were of sufficient weight to leave the partial defence to the jury'.⁸¹ The effect is that the victim's actions beyond his or her sexual infidelity (for example, the victim's taunts about C's failed suicide attempt) may satisfy the qualifying trigger(s) when considered in the context of that infidelity.⁸²

Baker and Zhao contend that this is the wrong approach and if the taunts *per se* were incapable of satisfying the partial defence, then there was no need to assess whether 'a person of D's sex and age with a normal degree of tolerance and self-restraint and in the circumstances of D' **J. Crim. L. 527* might have acted in the same or a similar way to D'.⁸³ In contrast, the Court of Appeal asserted that although its ruling was consistent with the views of those who opposed the sexual infidelity prohibition in its entirety, it did not depart from the views of the ministers responsible for the legislation during its passage through Parliament.⁸⁴ 'we do not accept that [sexual infidelity] of *itself* ought to lead to reducing a murder finding';⁸⁵ 'if other factors come into play, the court will of course have an opportunity to consider them, but it will not be able to make the decision *exclusively* on the ground of sexual infidelity'⁸⁶; 'We are simply saying that sexual infidelity *in itself* cannot and should not be ... a defence for murder'.⁸⁷ If this was Parliament's intention, then the statutory exclusion is unnecessary on grounds that sexual infidelity *per se* could not possibly result in a fear of serious violence or cause D to have a *justified* sense of being seriously wronged.

The NSWLCSC has similarly criticised the sexual infidelity prohibition in its report on the partial defence of provocation.⁸⁸ The Committee was established following the high-profile case of *R v Singh*,⁸⁹ in which the defendant cut his wife's throat in a 'ferocious attack' after she allegedly denied ever having loved him, told him she was going to leave and threatened to have him deported. The case attracted significant media attention⁹⁰ and resulted in public outrage when the defendant had his conviction reduced from murder to manslaughter⁹¹ and was sentenced to eight years' imprisonment, with a six-year non-parole period.⁹²

In terms of substantive reform to the partial defence, a number of high-profile stakeholders⁹³ provided some support for an 'exclusionary conduct' model, but queried its workability citing *Clinton*,⁹⁴ whilst others went further, naming *Clinton* as the reason why such a model should be avoided.⁹⁵

Nevertheless, many Inquiry participants were supportive of specific exclusionary clauses relating to non-violent sexual advances, anything said or done by the victim in the exercise of personal autonomy about their lives and relationships, and words alone. As previously noted, commentators have suggested that the defence should be unavailable where the defendant killed while acting under the influence of self-induced intoxication.⁹⁶ The NSWLCSC concluded that there was merit in specific exclusions pertaining to non-violent sexual advances, **J. Crim. L. 528* sexual jealousy and sexual infidelity, but asserted that 'the exclusionary approach to reform is particularly vulnerable to manipulation'⁹⁷ and in light of the *Clinton* ruling it is 'critically important' that any delimiting clauses are drafted to reflect the policy intention underpinning them; further, that intention should be clearly articulated by legislators during the parliamentary process.⁹⁸ The NSWLCSC noted that the 'ineffectiveness' of s. 55(6)(c) of the 2009 Act could have been prevented by careful and precise legislative drafting, specifying that the prohibited conduct cannot, 'in and of itself',⁹⁹ be relied upon as provocative behaviour.¹⁰⁰ Arguably, this would add little to the partial defence since it has long been established that sexual infidelity does not 'in and of itself',¹⁰¹ constitute a valid ground for the concessionary defence.

Constituit iudicem legi

The ruling in *Clinton* has polarised opinion. For many it represents a common-sense approach to a tautological and imprecise provision.¹⁰² It is highly artificial to require that specific events are isolated from their context.¹⁰³ Other commentators have voiced their disapproval:

The Court of Appeal has likely ensured that the sexual infidelity provocation [*sic*] within the new partial defence of loss of control will be largely ineffective in minimising the use of the defence by men who kill a female intimate partner in the context of sexual infidelity. As described by one media commentator at the time, the decision 'restores the defence in so-called crime of passion cases' ... and as such raises the fear that in practice this new partial defence will do little to overcome the problems associated with the now abolished provocation defence.¹⁰⁴

Regardless of whether the ruling is welcomed or criticised, through novel construction of the statutory provision and by judicial sleight of hand, fact-finders are not only entitled to consider sexual infidelity but to fuse it with other factors in order to satisfy the seriously wronged trigger, and it cannot be denied that this form of *constituit iudicem legi* **J. Crim. L. 529* causes substantial uncertainty in terms of the applicability of the concessionary defence. The judicial remedy provided in *Clinton* effectively ignores the sexual infidelity prohibition in a manner which extends the availability of the partial defence without achieving finality or certainty. Judicial law-making may have prevailed over the wording of the statute in this context. This battleground between judicial and statutory impact has many different layers in substantive criminal law. In the controversial case of *DPP v C (A Minor)*,¹⁰⁵ Lord Lowry expertly articulated the undesirability of the judicial remedy approach to *doli incapax* principles:

- (1) If the solution is doubtful, the judges should beware of imposing their own remedy.
- (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched.
- (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems.
- (4) Fundamental legal doctrines should not be lightly set aside.
- (5) Judges should not make a change unless they can achieve finality and certainty.¹⁰⁶

Accordingly, it was left to Parliament to abolish the rebuttable presumption of criminal law that 'a child aged 10 or over is incapable of committing an offence'.¹⁰⁷ Similarly, in the controversial case of *R v Clegg*,¹⁰⁸ the Court of Appeal declined to reduce a murder conviction to manslaughter on grounds that the defendant had used excessive force in self-defence. The case involved a British soldier on patrol in Northern Ireland, who opened fire on the occupants of a stolen car which had failed to stop at a checkpoint. According to his evidence, the defendant believed that the life of his colleague on the opposite side of the road was in danger. He fired three shots at the windscreen of the car and a fourth shot at the side of the car as it was passing. The trial judge ruled that the final shot, which killed the rear-seat passenger, was not fired in self-defence. The certified question of law in *Clegg* was whether a soldier on duty, who kills a person with the requisite intention for murder, but who would be entitled

to rely on self-defence, but for the excessive use of force, is guilty of murder or manslaughter.¹⁰⁹ The court considered that had Parliament intended to create a qualified defence in cases where the defendant uses excessive and unreasonable force in preventing crime it **J. Crim. L. 530* would have done so under s. 3 of the Criminal Law Act 1967.¹¹⁰ The court acknowledged the severity of its ruling¹¹¹ and the boundaries of jurisprudential precedent:

I can find no escape from the conclusion that if a crime was committed, it was murder if the shot was fired with intent to kill or seriously wound. To hold that it could be manslaughter would be to make entirely new law. If a plea of self-defence is put forward in answer to a charge of murder and fails because excessive force was used though some force was justifiable, as the law now stands the accused cannot be convicted of manslaughter. It may be that a strong case can be made for an alteration of the law to enable a verdict of manslaughter to be returned where the use of some force was justifiable but that is a matter for legislation and not for judicial decision.¹¹²

In other areas, the courts have been more inclined towards judicial activism. For example, the House of Lords, in *R v R*,¹¹³ abolished the marital rape exemption without waiting for Parliament. The indemnity was predicated on the words of Sir Matthew Hale in 1736, when he stated in the *History of Pleas of the Crown* :

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.¹¹⁴

The courts had assumed that Parliament intended to retain the immunity of the husband when enacting s. 1(1) of the Sexual Offences (Amendment) Act 1976, which provides: 'a man commits rape if--(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it ...'. The word 'unlawful' was interpreted as referring to non-consensual sexual intercourse outside of the matrimonial relationship.¹¹⁵ Although the court acknowledged the view that this was an area where it should step aside to leave the matter to the parliamentary process, the House of Lords felt compelled to abolish the **J. Crim. L. 531* appalling rule which stipulated that a man was incapable of raping his wife:

This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.¹¹⁶

In *Clegg*, the House of Lords commended the ruling in *R*, but urged caution advising that it is inapposite to make such amendments where the course for development is unclear and Parliament, knowing of the difficulty, has chosen not to address the issue.¹¹⁷ Lord Lloyd of Berwick asserted that 'the reduction of what would otherwise be murder to manslaughter in a particular class of case seems to me essentially a decision for the legislature, and not [the House of Lords/Supreme Court] in its judicial capacity'.¹¹⁸ There is an obvious difference between the rulings in *Clegg* and *R*. In *Clegg*, the court was effectively being asked to allow a defence where one did not exist, whereas in *R* the House of Lords abolished an outdated and invidious legal principle.

The case of *Clinton*¹¹⁹ arguably has more in common with the case of *Clegg* than that of *R*. The Court of Appeal was asked to allow evidence of sexual infidelity to be considered as part of the defendant's loss of control claim, despite the existence of a specific statutory provision mandating that sexual infidelity is to be disregarded. In effect, the court was being asked to permit the reduction of what would otherwise be murder to manslaughter on the grounds of the victim's infidelity plus the taunts regarding the defendant's failed suicide attempt. The fact that the court was willing to allow evidence of the victim's sexual infidelity to be considered as part of the objective assessment as to whether the defendant lost his self-control is arguably akin to allowing a new partial defence.

Lord Lowry, in *DPP v C (A Minor)*,¹²⁰ similarly urged caution where 'Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched'.¹²¹ The 'rape of a child' and 'the abused wife' scenarios (considered above) which were presented during parliamentary debate on the Coroners and Justice Bill to illustrate the difficulties associated with the introduction of an explicit exclusionary clause effectively gave Parliament notice of the problems presented by the introduction of a specific prohibition pertaining to sexual infidelity. Despite being put on notice of these complications, Parliament saw fit to legislate in this area. Akin to *Clegg*, it was therefore inappropriate for the Court of Appeal to introduce a partial defence of **J. Crim. L. 532* sexual infidelity plus,¹²² no matter how logical that ruling might appear to be.

New South Wales

Despite the problems encountered in England and Wales, the exclusionary conduct model garnered support from a significant proportion of Inquiry participants in New South Wales.¹²³ Contributors identified several types of conduct which they believed should be excluded from consideration as part of provocation claims. As noted, this included, *inter alia*, sexual infidelity and non-violent sexual advances.¹²⁴ In a bid to circumvent the difficulties associated with s. 55(6)(c) of the 2009 Act, the New South Wales Select Committee recommended the introduction of a very specific exclusionary clause¹²⁵ which would preclude the availability of the NSW provocation defence, 'other than in circumstances of a most extreme and exceptional character', if:

A domestic relationship exists between the defendant and another person; and,

(a) The defendant unlawfully kills that person and/or another person (the deceased); and,

(b) The provocation is based on anything done by the deceased or anything the person believes the deceased to have done--

a. To end the relationship; or

***J. Crim. L. 533** b. To change the nature of the relationship; or

c. To indicate that the relationship may, should or will end,¹²⁶ or that there may, should or will be a change to the nature of the relationship, and that for the purposes of determining the above, the court should have regard to the following circumstances where a defendant (except in some 'extreme and exceptional circumstances') should not be able to avail themselves of the partial defence of gross provocation:

These scenarios are designed to cover instances in which the victim attempts to exercise personal autonomy.¹²⁷ Inquiry participants asserted that '[t]he continued use of the partial defence of provocation where killings have occurred in the context of sexual infidelity or a change in relationship condones and sanctions violence against women. In effect women are being killed for exercising their right to end a relationship'.¹²⁸ The focus on the 'changing nature of the relationship' is more appropriate than concentrating on sexual infidelity. The experience in England has been preoccupied with sexual infidelity rather than the rationale underpinning the exclusionary clause.¹²⁹ Speaking in his role as a Law Commissioner, Professor Jeremy Horder asserted that the preeminence attached to sexual infidelity as a primordial exclusionary ***J. Crim. L. 534** basis is simply 'bizarre'¹³⁰ and questioned whether the government had confused sexual infidelity with excessive jealousy, envy and male proprietorialness.¹³¹

The aim of the NSWLCSC recommendation is to restrict the availability of the partial defence to defendants who kill their partners after subjecting them to systematic and prolonged abuse, while ensuring that it remains available to abused defendants who 'lash out' killing their tormentor.¹³² Interestingly, the exclusionary provision does not appear to cover the 'obsessed stalker scenario' since many stalking situations do not necessarily arise from the breakdown or changing nature of a relationship. An increase in the use of social media, in particular, often means that the defendant may never have met the victim when he or she begins to develop the obsession. This lack of coherence is equally applicable to the 2009 Act where the exclusionary clause is unlikely to apply to stalking cases:

D became obsessed with C (an ex-girlfriend) who had ended their relationship and began stalking her. One evening, D found C having sex in a car with V, whereupon D fetched a knife and stabbed V to death. ('The obsessed stalker')¹³³

It is somewhat paradoxical to exclude sexual infidelity from juror evaluation in the 'rape of a child' and 'abused wife' scenarios, identified above, whilst leaving stalking cases to be considered by the trial judge, particularly in light of the increase in reports of stalking within England and Wales.¹³⁴ The Protection of Freedoms Act 2012 made stalking a criminal offence for the first time by inserting three new offences of stalking into the Protection from Harassment Act 1997¹³⁵ and the Director of Public Prosecutions has issued interim guidelines on prosecuting in cases involving social media.¹³⁶ The new provisions are designed to ***J. Crim. L. 535** address specific stalking behaviour as opposed to harassment more generally¹³⁷ and would extend to the 'obsessed stalker' scenario. In light of the problems associated with stalking it is surprising that the exclusionary clause does not extend to envy, proprietorialness and stalking.¹³⁸ Nevertheless, this would represent an unwarranted extension of a hopelessly defective clause, since the 'obsessed stalker' will remain ineligible to claim the loss of

control defence because the trial judge has the authority to remove pleas predicated on possessiveness and jealousy from juror consideration.¹³⁹ In this regard, the sexual infidelity prohibition is superfluous since the loss of control defence will only be left to the jury if sufficient evidence is adduced which, in the opinion of the trial judge, a properly directed jury could reasonably conclude that the defence might apply.¹⁴⁰

In a bid to assuage concerns that the exclusionary conduct model places primordial emphasis on specific scenarios at the expense of equally deserving cases, the NSWLCSC asserts that the list is not designed to be exhaustive but, rather, provides examples of the forms of conduct which should be excluded from forming a valid basis for the partial defence. The problem with providing such a list, however, is that it begs the question as to why other forms of conduct were excluded from that list. Commenting on the English sexual infidelity exclusion, Widdecombe asked, 'What is unique about sexual infidelity that it must be removed from the almost endless list of circumstances in which somebody might be provoked?'¹⁴¹ Difficulties also arise when interpreting the type of behaviour that the list is designed to exclude. The English 'sexual infidelity' prohibition has been described as a 'formidably difficult provision' and the most 'critical problem' as regards the loss of control defence.¹⁴² There are obvious difficulties associated with defining the term 'sexual infidelity' and/or assessing the scope of the 'words and acts constituting' it¹⁴³ and in many cases it will be impossible to disentangle sexual infidelity from other factors. This problem is likely **J. Crim. L. 536* to arise in New South Wales if para. (ii) is enacted. Tolmie urges caution in this respect:

I think one case that the Committee would be well served to read as a cautionary tale is *R v Clinton, Parker, Evans* : a recent House of Lords [*sic*] decision this year. England tried to modify its provocation defence ... and the House of Lords [*sic*] unpicked it in that particular case ... Sexual infidelity was removed as a qualifying trigger ... The House of Lords [*sic*] said it was ridiculous and it could not apply it. It effectively read it in such a way that it is a dead letter. I think it is a cautionary case to read and to think about what judges can do with these provisions if they are not very carefully crafted.¹⁴⁴

Similar interpretative difficulties are likely to arise in relation to the NSWLCSC's recommendation that non-violent sexual advances be omitted from the concessionary mitigation. It was suggested that the exclusionary clause should be gender neutral, but, in practice, it is recognised that 'the defence has only ever applied in the case of a nonviolent sexual advance from a male to another male ...'.¹⁴⁵ The specific prohibition is designed to prevent the availability of what has colloquially become known as the 'gay panic defence' which has the potential to legitimise murder 'that is informed by bigotry'.¹⁴⁶ Inquiry participants assert that the provision would assist in preventing 'the differential treatment to gay males in the legal system which has otherwise delivered inequality'.¹⁴⁷ In line with the sexual infidelity exclusion, the term 'non-violent sexual advance' is inherently vague:

The delineation between what constitutes 'a non-violent sexual advance' and what does not is not necessarily clear ... a grab on the arm, or on the buttock, may constitute a common assault. It could, therefore, be argued that such an advance is no longer non-violent.¹⁴⁸

This undermines the basis of the entire provision. Although the recommendation is designed to reflect current norms and societal expectations, it fails to accommodate the complexities of real life. In practice, it is likely that the defendant will allege that the sexual advance could be categorised as violent. Further, it has been suggested that the exclusionary conduct model ought only to apply where the conduct excluded is the only provocative behaviour to be relied upon. This is in line with provisions in the Northern Territory and the Australian Capital Territory.¹⁴⁹ The ACT provision, which is almost identical to the Northern Territory provision, provides:

However, conduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused--

**J. Crim. L. 537* (a) is taken not to be sufficient, by itself, to be conduct to which subsection (2)(b) [the provocative conduct] applies; but

(b) may be taken into account together with other conduct of the deceased in deciding whether there has been an act or omission to which subsection (2) applies.¹⁵⁰

The effect is that such conduct is not excluded where it is relevant to other factors i.e. it is not the only provocative conduct to be relied upon. This is reflective of the manifold factors which usually comprise provocation claims since everyday life tells us that individual conduct cannot be compartmentalised and isolated from its context. The flexibility built into the provision, however, means that it is likely that

provocation claims involving non-violent sexual advances will be individually tailored in order to circumvent the exclusion.

Phased abolition?

Inquiry participants in New South Wales assert that limiting the partial defence so that it applies in 'circumstances of a most extreme and exceptional character' will go a significant way toward preventing the availability of the defence in cases where the defendant kills in response to the victim exercising personal autonomy.¹⁵¹ It is submitted, however, that the phrase is vague and has the potential to create a 'loophole' in the law.¹⁵² This is because provocation is designed to apply in 'circumstances of a most extreme and exceptional character'¹⁵³ and as such it is difficult to see what an exclusionary conduct model would offer where it would only apply if the case was not one of extreme and exceptional character. In this respect, the novel terminology is likely to give rise to the same problems encountered in England and Wales. As previously noted, the Court of Appeal in *Clinton* asserted that its ruling accorded with the views of the parliamentarians enacting the sexual infidelity exclusion. The Court of Appeal claimed that Parliament only ever intended to exclude sexual infidelity *per se*. If that is truly the case then the sexual infidelity prohibition constitutes a superfluous aspect of the concessionary mitigation. It might be suggested that s. 55(6)(c) appears to have more to do with political rhetoric than principled reform in this respect.

Concerns regarding whether an 'all-legislative amendment', such as that suggested by the NSWLCSC, is capable of achieving the desired outcome¹⁵⁴ are well founded. Although a number of Inquiry participants appeared to prefer an 'all or nothing' approach to the exclusionary conduct model, this would lack the flexibility required to deal with exceptional cases such as that of the 'abused wife' scenario identified above. The extensive list suggested by the NSWLCSC questions the very **J. Crim. L. 538* basis of the partial defence 'as a concession to human frailty'¹⁵⁵ and, perhaps, indicates the beginning of 'a phased approach to abolition'.¹⁵⁶ Many of the Inquiry participants who favoured the exclusionary conduct model did so as their second choice with most preferring abolition of the partial defence.¹⁵⁷ Academicians have suggested that the exclusionary conduct model could provide an interim measure pending a comprehensive review of homicide law.¹⁵⁸ The effect of abolition is that consideration of provocative words and/or conduct is removed from the trial setting and transplanted within the sentencing process, if they are considered at all.¹⁵⁹

The provocation defence was abolished in 2003 in Tasmania.¹⁶⁰ As a result, provocation may only be considered in mitigation during sentencing. In 1655, Judge Aske, questioned whether the provocation defence was appropriate when he said, 'I find no difference between murder and manslaughter, for it makes no difference between hot blood and cold blood, as we do now distinguish.'¹⁶¹ In the present day, the Tasmanian Director of Public Prosecutions espoused:

One of the hallmarks of [provocation] is a sudden loss of self-control. This is not entirely consistent with the expectations of a civilised society. With the abolition of mandatory life imprisonment for murder, and the ability to impose a sentence reflective of the circumstances, it seems to me questionable that provocation as a defence needs to be retained.¹⁶²

Despite the problems with the concessionary defence, 'there are cases where a person has killed in response to ... circumstances that are so horrible that most people would not want to label the person a "murderer" and would not want them to serve life imprisonment'.¹⁶³ It will be recalled that in *R v Cocker*,¹⁶⁴ the defendant suffocated his wife when her pleas that he put an end to her suffering became too much for him. The defendant pleaded guilty to murder following the trial judge's ruling that there was no evidence of provocation and his subsequent appeal was **J. Crim. L. 539* dismissed on grounds that there was no evidence that he had lost his self-control.¹⁶⁵ Tolmie recounts the case of a doctor who successfully raised the provocation defence after he eventually 'snapped in response to his mother begging for relief from the pain of the final stages of her terminal bowel cancer and sped up her eventual death';¹⁶⁶ it is cases of this nature which 'cry out for a reduced sentence' and require a lesser verdict of voluntary manslaughter.¹⁶⁷ The stigma attached to the offence of murder should not be imposed on those who kill because they are provoked.¹⁶⁸ By failing to differentiate between those who kill because of some form of mental abnormality or in response to a loss of self-control, and those who kill in cold blood, the law is at risk of losing its moral credibility.¹⁶⁹ The partial defence of provocation (loss of control) plays a vital role in this regard, since it has the 'unique effect of altering a charge of murder to one of manslaughter'.¹⁷⁰

The NSWLCSC recommendation leaves the notion of 'circumstances of a most extreme and

exceptional character' open to interpretation. It has been suggested that '[exclusionary models] would protect against potential prejudices by judges and jurors and would also send a message that the accused's response was contrary to the rights of the deceased and explicitly unacceptable and inexcusable',¹⁷¹ but only at the expense of complicating the law and potentially causing grave injustice in certain cases. The English government 'decided that thousands of years of *J. Crim. L. 540 human history and experience should be jettisoned for a piece of political correctness and proclamation: a declaratory statement that sexual infidelity can never justify violent behaviour'¹⁷² and the New South Wales Parliament risks doing the same, albeit using more sophisticated wording. A more appropriate method of ensuring that undeserving cases are not left to jurors is to rely on the trial judge to filter out unmeritorious cases¹⁷³ as recommended by the NSWLCSC¹⁷⁴ and the English Law Commission.¹⁷⁵

Conclusion

Exclusionary conduct models are designed to reflect contemporary normative societal expectations, but often fail to accommodate the complexities of real life. In order for an exclusionary clause to be effective, the provision must adopt an 'all or nothing' approach which renders particular forms of conduct admissible or inadmissible when assessing culpability, in order to avoid further instances of *constituit iudicem legi* in this area. Any attempt to build discretion into an exclusionary conduct model potentially creates a loophole in the law. The NSWLCSC recommendation that the exclusionary conduct model applies 'other than in cases of a most extreme and exceptional character' is a fundamental example of this problem. In the majority of cases, the provocative behaviour will be recast in such a way that it can be construed as coming within the ambit of the loss of control/provocation defence.

The lessons learned in England and Wales regarding the reach of the controversial s. 55(6)(c) delimitation should provide a salutary warning against the use of exclusionary conduct models in other jurisdictions. Exclusionary clauses give rise to interpretational difficulties and it is inappropriate to expect jurors to disregard specific aspects of the victim's conduct when determining whether the loss of control/provocation defence is satisfied. In cases where it is unclear whether the defence ought to apply 'it is very dangerous ... to deprive juries of the opportunity to use their good sense to evaluate that evidence'¹⁷⁶ and wholesale bans on specific forms of provocative conduct serve to prevent such appraisals. If the aim is to ensure that normative expectations are met, it is imperative that the role of the jury is not circumscribed to the extent that specific forms of provocative conduct are automatically excluded from objective evaluation.¹⁷⁷

***J. Crim. L. 541** In England and Wales, the trial judge has the authority to filter out unmeritorious cases by removing the concessionary mitigation¹⁷⁸ on grounds that no jury properly directed could reasonably conclude that the defence might apply and an equivalent provision is recommended in New South Wales.¹⁷⁹ This is not about legitimising violent and fatal reactions to the autonomous actions of a spouse or partner, but it is about identifying that in reality events cannot be isolated from their context. In some cases there may be a legitimate provocation claim and it is for this reason that the judge and jury are a vital tool in ensuring that provocation is available only in deserving cases. The optimal solution for New South Wales in cases of this context would be to adopt a more satisfactory equipoise by avoiding the imposition of exclusionary clauses which apply to the victim's conduct and to trust the trial judge to filter out unmeritorious cases. Social norms can be mediated through the trial judge and jury.

In contrast, plainly worded exclusionary clauses which focus on the defendant's conduct may be appropriate where the aim is to delimit the concessionary defence based upon the defendant's actions in causing or contributing to a qualifying trigger/provocation claim. In terms of appropriate exculpation, it is clear that when a defendant has incited the provocation, the defence will be precluded based upon the prevenient fault of the defendant in instigating the victim's behaviour. Similarly, where the defendant kills out of revenge, he or she ought to be regarded fully responsible for his or her actions. It might also be apposite to exclude statutorily evidence of voluntarily induced intoxication from the objective assessment as to whether the ordinary person would have lost his or her self-control in like circumstances. The defendant's prior fault in becoming intoxicated prevents him or her from raising such evidence as part of a loss of control/provocation claim.

These types of exclusion are less problematic than prohibitions which focus on the conduct of the victim because fault rests with the defendant in these cases. It is the defendant's responsibility for inciting the provocation, acting out of a considered desire for revenge and/or becoming intoxicated

which justifies barring the concessionary mitigation or adopting a nuanced approach to the applicability of the partial defence. Notwithstanding these observations, any exclusionary clause must be carefully drafted to ensure that it is appropriately applied. For instance, a statutory prohibition on intoxication evidence would need to address explicitly the situation where the defendant's condition has reached the level of dependency. Initially the Ministry of Justice indicated that:

***J. Crim. L. 542** factors, such as alcoholism or a mental condition, which affect the defendant's general capacity for self-control, would not be relevant to this partial defence (though they might be to diminished responsibility). Characteristics (e.g. intoxication, irritability, excessive jealousy) which do not arise from a medical condition and do not satisfy the test for diminished responsibility should be disregarded altogether.¹⁸⁰

The Court of Appeal in *Asmelash*,¹⁸¹ however, suggested that a nuanced approach ought to apply where the defendant suffers from alcohol dependence syndrome and is mercilessly taunted about that condition.

In this respect, explicit legislative exclusions do have the potential to prevent unnecessary appellate litigation, but only in limited circumstances and within the bounds of individual preventing culpability. Specific exclusionary clauses should only be enacted where Parliament is certain that the prohibition will not arbitrarily preclude the partial defence based upon conduct over which the defendant has no control. In all cases Parliament ought to ensure that the exclusionary clause is truly necessary otherwise it could be suggested that the enactment has more to do with political rhetoric than principled criminal law reform.

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1. New South Wales Legislative Council Select Committee (NSWLCSC), *The Partial Defence of Provocation* (2013), available at <http://www.parliament.nsw.gov.au/provocationcommittee>, accessed 15 October 2013. Quote from para. 6.71 (Submission 9a, Family Voice, Australia, p. 2). 'The most common thing one reads in the press in murder cases is that the wife or husband finds the other spouse in the sexual act, loses control, picks up a bread knife or whatever comes to hand and stabs and sometimes kills the other spouse. That is French-style crime *passionnel*. Are we now turning this into something that the English, with their stiff upper lip, will take as an ordinary incident of marital life? That is ridiculous and out of line with the way people think about human passions. It is one great terrible event that can happen in a married life and to say that it should be disregarded makes nonsense of ... the whole of the reform': Coroners and Justice Bill, *Hansard*, HL Deb, col. 576, 7 July 2009 (Lord Neill of Bladen).
 2. NSWLCSC, above n. 1.
 3. Sections 54-56 of the Coroners and Justice Act 2009 were brought into force on 4 October 2010 (Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010 (SI 2010 No. 816)).
 4. Discussed further below. See also NSWLCSC, above n. 1 and N. Wake, 'Battered Women, Startled Householders and Psychological Self-defence: Anglo-Australian Perspectives' (2013) 77 JCL 433.
 5. 'In determining whether a loss of self-control had a qualifying trigger ... the fact that a thing done or said constituted sexual infidelity is to be disregarded': Coroners and Justice Act 2009, s. 55(6)(c).
 6. NSWLCSC, above n. 1, recommendations 6 and 7.
 7. NSWLCSC, above n. 1.
 8. *R v Clinton* [2012] EWCA Crim 2. For an analysis of *Clinton*, see *R v Clinton (Jon-Jacques)* (2012) 76 JCL 197, commentary by N. Wake.
 9. NSWLCSC, above n. 1 at para. 6.101.
 10. *Ibid.* at para. 6.103.
 11. *Ibid.* at para. 6.105.
 12. *Ibid.* at para. 9.9.

13. Considered in further detail below.
14. See s. 54(6) of the Coroners and Justice Act 2009. The NSWLCSC similarly recommends '[t]hat the NSW Government introduce an amendment to section 23 of the Crimes Act 1900 to provide that a judge should not be required to leave a defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply' (NSWLCSC, above n. 1, recommendation 9).
15. For an in-depth analysis of the complex inter-relationship between voluntary acute intoxication and the partial defences, see A. Reed and N. Wake, 'Potentiate Liability and Preventing Fault Attribution: The Intoxicated "Offender" and Anglo-American Standardisations' (2014) J Marshall L Rev, forthcoming.
16. Coroners and Justice Act 2009, s. 54(1)(a).
17. Coroners and Justice Act 2009, s. 54(2).
18. Coroners and Justice Act 2009, s. 54(4).
19. The 'seriously wronged' trigger.
20. The 'fear' trigger: Coroners and Justice Act 2009, ss 54(1)(b) and 55(2), (3), (4)(a) and (b).
21. Coroners and Justice Act 2009, s. 55(6)(a)-(b).
22. Coroners and Justice Act 2009, s. 55(6)(c).
23. The 'ordinary person' test: Coroners and Justice Act 2009, s. 54(1)(c).
24. Coroners and Justice Act 2009, s. 54(3). See, e.g., *R v Asmelash* [2013] EWCA Crim 157.
25. Coroners and Justice Act 2009, s. 55(6)(a)-(b). For an analysis of the prior fault principles, albeit in the context of voluntary intoxication and the insanity defence, see Law Commission, *Criminal Liability: Insanity and Automatism*, Law Com. Discussion Paper (2013).
26. Coroners and Justice Act 2009, s. 54(4).
27. See generally P. H. Robinson, 'Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine' (1985) 71 Virg L Rev 1 at 17.
28. See generally, R. Shiner, 'Intoxication and Responsibility' (1990) 13 *International Journal of Law and Psychiatry* 9; C. Mitchell, 'The Intoxicated Offender--Refuting the Legal and Medical Myths' (1988) 11 *International Journal of Law and Psychiatry* 77; and A. Ward, 'Making Some Sense of Self-induced Intoxication' [1986] Camb LJ 247.
29. [1963] AC 349.
30. Above n. 29. This view appears to be equally applicable to the new loss of control defence, under ss 54-55 of the 2009 Act. In *R v Asmelash* [2013] EWCA Crim 157 at [17], it was suggested by counsel that the partial defence should not be available where the defendant had been drinking to give himself Dutch courage for some violent action.
31. See generally, A. Simester, 'Intoxication Is Never a Defence' [2009] Crim LR 3 and A. Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press: Oxford, 2012).
32. NSWLCSC, above n. 1, recommendation 8.
33. [2013] EWCA Crim 157.
34. *R v Asmelash* [2013] EWCA Crim 157 at [21]. The Supplement to the *Crown Court Bench Book* (October 2011) 66 states: 'D's circumstances would include the consumption of alcohol. The jury will no longer be directed that a reasonable man is a sober man. The jury will need to decide whether a man in these circumstances (including the consumption of drink) but nevertheless possessing a normal degree of tolerance and self-restraint might act as D did. It is suggested that the jury may still be directed that D's conduct is to be judged by the standard of the person who retained a normal degree of tolerance and self-restraint even if that person had consumed alcohol as D did'; cited in *R v Asmelash* [2013] EWCA Crim 157 at [17]. This suggestion was criticised as ignoring the wording of the loss of control defence: *R v Asmelash* [2013] EWCA Crim 157 at [20]. See also, David Ormerod's comments: 's.54(3) only appears to exclude a circumstance on which D seeks to rely if its sole relevance is to diminish D's self-restraint. This could open the opportunity for D to adduce all sorts of evidence. In particular, D might claim that his intake of alcohol or other intoxicants was a relevant circumstance and that the intoxication did not simply diminish his self-restraint, but also had some other relevance--e.g. that it caused a relevant mistake. This may amount to no more than a plea of lack of intent on grounds of intoxication, but it will make directing the jury more complex': D. Ormerod, *Smith and Hogan's Criminal Law* (Oxford University Press: Oxford, 2011) 526.
35. *DPP v Majewski* [1976] UKHL 2, [1977] AC 443; and see A. Dashwood, 'Logic and the Lords in *Majewski*' [1977] Crim LR 532.
36. *R v Asmelash* [2013] EWCA Crim 157 (emphasis added). For further discussion on this aspect of the partial defence,

see *R v Asmelash* (2013) 77 JCL 292, commentary by A. Jackson and N. Wortley.

37. The ruling in *R v Asmelash* [2013] EWCA Crim 157 has the effect of aligning loss of control with the diminished responsibility defence where evidence of voluntary acute intoxication is adduced. See *R v Dowds* [2012] EWCA Crim 281. See also *R v Dowds* (2012) 76 JCL 197, commentary by N. Wake. It is recognised that it would be inappropriate for the partial defences to apply different rules in the context of intoxicated offenders particularly where it is not uncommon for both defences to be raised simultaneously: *R v Asmelash* [2013] EWCA Crim 157.
38. Law Commission, *Murder, Manslaughter and Infanticide*, Law Com. Report No. 304 (2006).
39. *R v Asmelash* [2013] EWCA Crim 157 at [15]. See also Reed and Wake, above n. 15.
40. NSWLCSC, above n. 1, recommendation 8 and para. 9.10. The benefit of an explicit exclusionary clause was recently recognised by the Law Commission in its proposals for a new defence of 'not criminally responsible by reason of recognised medical condition'. The proposals specifically state that acute intoxication and any condition which is manifested solely or principally by abnormally aggressive or seriously irresponsible behaviour will not qualify as a recognised medical condition for the purposes of the new defence: Law Commission, above n. 25.
41. This provision sets out specific circumstances in which the defendant's intoxication would be regarded as involuntary. This list can be accessed via the following link: http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s428a.html, accessed 16 October 2013.
42. NSWLCSC, above n. 1.
43. For an in-depth analysis of exclusion clauses pertaining to voluntary acute intoxication, see N. Wake, 'Recognising Acute Intoxication as Diminished Responsibility: A Comparative Analysis' (2012) 76 JCL 71. It is worth noting that in *R v C* [2013] EWCA Crim 223 at [16], the court noted that drug abuse is not a mental disorder for the purposes of the insanity defence. However, harmful use is identified within the ICD-10 World Health Organisation, *ICD-10: Mental and Behavioural Disorders Due to Psychoactive Substance Abuse*, ch. V, F10-F19, available at <http://apps.who.int/classifications/apps/icd/icd10online/>, accessed 17 October 2013. The case of *R v Dowds* [2012] EWCA Crim 281 highlighted that not all conditions recognised by the World Health Organisation would satisfy s. 52 of the Coroners and Justice Act 2009, but it might be helpful if Parliament had outlined which conditions relating to intoxication should be excluded from consideration for the purposes of the partial defences.
44. *R v Asmelash* [2013] EWCA Crim 157 at [25].
45. For further discussion, see Reed and Wake, above n. 15.
46. See, e.g., Coroners and Justice Act 2009, s. 52 and *R v Dowds* [2012] EWCA Crim 281. See also *R v O'Grady* [1987] 3 WLR 321.
47. *R v Hasan* [2005] UKHL 22, [2005] 2 WLR 709.
48. House of Commons, Coroners and Justice Bill, Committee Stage (CJ 01, 2009) memorandum from Professor Jeremy Horder, Law Commissioner of England and Wales, available at <http://www.publications.parliament.uk/pa/cm200809/cmpublic/coroners/memos/ucm102.htm>, accessed 15 October 2013. See also A. Reed and N. Wake, 'Anglo-American Perspectives on Partial Defences: Something Old; Something Borrowed; Something New' in A. Reed and M. Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: 2011).
49. Coroners and Justice Bill, Report Stage, *Hansard*, HL Deb, 26 October 2009, col. 1062 (Lord Bach, Parliamentary Under-Secretary of State, Ministry of Justice). Early case law suggested that the defendant's retaliation to the 'injustice' of his wife's sexual infidelity 'restored the balance of justice': Aristotle, *Nicomachean Ethics*, Book V, 8, cited in A. Ashworth, 'The Doctrine of Provocation' (1976) 35 Camb LJ 292 and M. Ancel, 'Le Crime Passionnel' (1957) 73 LQR 36 at 37.
50. '[W]e have left behind us the age when the wife's subjection to her husband was regarded by the law as the basis of the marital relation ... Parliament has now conferred on the aggrieved wife the same right to divorce her husband for unfaithfulness alone as he holds against her, and neither, on hearing an admission of adultery from the other, can use physical violence against the other which results in death and then urge that the provocation received reduces the crime to mere manslaughter': *Holmes v DPP* [1946] AC 588 at 600. 'Over a third of men hanged in England and Wales between 1900 and 1950 were convicted of murdering wives or current and former women partners, their tales of unfaithful women failing to sway judges to direct manslaughter convictions': A. Howe, "'Red Mist' Homicide: Sexual Infidelity and the English Law of Murder (Glossing *Titus Andronicus*)' (2013) 33 *Legal Studies* 418.
51. House of Commons (CJ 01, 2009) above n. 48.
52. [1975] QB 691. See also *Holmes v DPP* [1946] AC 588 at 600: 'a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter'.
53. *Hansard*, HL Deb, 11 November 2009, col. 839.
54. This is taken verbatim from the example provided in *Hansard*, HC Deb, 9 November 2009, col. 82 (Mr Llwyd).
55. [2013] EWCA Crim 322, [2013] 3 All ER 308. In this conjoined appeal case, the Court of Appeal provided its first

interpretation of the loss of control defence in the Coroners and Justice Act 2009 where fear of violence has been adduced, and offered guidance as to its application. For further analysis, see Wake, above n. 4.

56. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [26] (emphasis supplied). The court also noted that there was insufficient evidence of a loss of self-control and that the victim's alleged sexual infidelity could not be relied upon for the purposes of ss 54-56 of the 2009 Act.
57. Law Commission, *Partial Defences to Murder*, Law Com. Report No. 290 (2004).
58. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [61]; see also Law Commission, *Partial Defences to Murder* (Law Com. Report No. 137 (2003) para. 12.25. 'A man may conjure up a motive or reasons sufficient for himself to cause him to kill, but it does not follow that that provides evidence of provocation': *R v Gauthier* (1944) 29 Cr App R 113.
59. Although see the comments of Lord Lloyd of Berwick: 'Why should we exclude infidelity from a jury's consideration? Is Parliament really ready to say that sexual infidelity can never give rise to a justifiable sense of being seriously wronged? Surely not': *Hansard*, HL Deb, col. 576, 7 July 2009.
60. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [26] (emphasis supplied).
61. *Hansard*, HC Deb, 9 November 2009, col. 83 (Claire Ward).
62. *R v Clinton* [2012] EWCA Crim 2 at [16].
63. The Court of Appeal in *R v Clinton* [2012] EWCA Crim 2 at [39] acknowledged that it 'may not be unduly burdensome to compartmentalise sexual infidelity where it is the only element relied on in support of a qualifying trigger, and, having compartmentalised it in this way, to disregard it'.
64. Derived from *Hansard*, HC Deb, 9 November 2009, col. 84 (Claire Ward).
65. D. J. Baker and L. X. Zhao, 'Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity' (2012) 76 JCL 263.
66. This example is derived *mutatis mutandis* from *Hansard*, HC Deb, 9 November 2009, col. 80 (Mr Grieve). The 'battered woman' is described as one 'who is repeatedly subjected to forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include ... women in any form of intimate relationship with men ... [I]n order to be classified as a battered woman the couple must go through the battering cycle at least twice ...': L. Walker, *The Battered Woman* (Harper and Row: 1979) XV.
67. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308.
68. The government specifically noted that the qualifying triggers ought not to be satisfied by a person who exercises individual autonomy in a relationship.
69. Baker and Zhao, above n. 65 at 268.
70. *Ibid.* at 268-9. For an analysis of the problems associated with the loss of control requirement, see Wake above n. 4.
71. *Hansard*, HC Deb, 9 November 2009, col. 88 (Mr Grieve).
72. Lord Judge CJ provides an example 'of the wife who has been physically abused over a long period, and whose loss of self-control was attributable to yet another beating by her husband, but also, for the first time, during the final beating, taunts of his sexual activities with another woman or other women. And so, after putting up with years of violent ill-treatment, what in reality finally caused the defendant's loss of control was hurtful language boasting of his sexual infidelity ... On this basis the earlier history of violence, as well as the violence on the instant occasion, would not, without reference to the claims of sexual infidelity, carry sufficient weight to constitute a qualifying trigger. Yet in the real world the husband's conduct over the years, and the impact of what he said on the particular occasion when he was killed, should surely be considered as a whole': *R v Clinton* [2012] EWCA Crim 2 at [24].
73. This is a particularly onerous task for jurors. Some commentators have asserted that there is no 'excusatory distinction' between retaliatory and revenge killings. Horder asserted that there is 'no moral justification for acting on a desire to take' retributive action personally and 'nothing morally understandable' in an angry reaction 'to warrant the exceptional mitigation of provoked killings from murder to manslaughter': J. Horder, *Punishment and Responsibility* (Clarendon Press: Oxford, 1992) 186 and 197. See generally J. E. Stannard, 'Towards a Normative Defence of Provocation in England and Ireland' (2002) 66 JCL 528 and J. Watkins, 'Responsibility in Context' (2006) 26 *Oxford Journal of Legal Studies* 593.
74. *Hansard*, HL Deb, cols 589-590, 7 July 2009 (Lord Thomas).
75. *Hansard*, HC Deb., 9 November 2009, 87 (Mr Grieve).
76. A. Reed and N. Wake, 'Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes' in A. Reed and M. Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: 2011) 129.

- [77.](#) *R v Clinton* [2012] EWCA Crim 2.
- [78.](#) This scenario replicates the facts of *R v Clinton* [2012] EWCA Crim 2 at [13]-[14].
- [79.](#) *R v Clinton* [2012] EWCA Crim 2 at [39].
- [80.](#) *Ibid.* at [49].
- [81.](#) *Ibid.* at [77].
- [82.](#) V. Baird, “‘Infidelity Plus’--the New Defence Against Murder”, *Guardian*, 23 January 2012, available at <http://www.guardian.co.uk/commentisfree/2012/jan/23/infidelity-plus-defence-murder>, accessed 15 October 2013. It is worth noting that Clinton subsequently pleaded guilty to the murder at his retrial; ‘Jon-Jaques Clinton makes u-turn at retrial for wife’s murder’, 3 September 2013, *BBC News*, available at <http://www.bbc.co.uk/news/uk-england-berkshire-19469372>, accessed 15 October 2013.
- [83.](#) Baker and Zhao, above n. 65.
- [84.](#) *R v Clinton* [2012] EWCA Crim 2.
- [85.](#) *Ibid.* at [41] (emphasis supplied by the court).
- [86.](#) *Ibid.* at [42] (emphasis supplied by the court).
- [87.](#) *Ibid.*
- [88.](#) Crimes Act 1900, s. 23. For the full provision, see http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s23.html, accessed 15 October 2013. ‘For some Inquiry participants, the *Clinton* case provided a clear reason why such a model should not be adopted’; NSWLCSC, above n. 1 at para. 6.41.
- [89.](#) *R v Singh* (2012) NSWSC 637 at [30].
- [90.](#) NSWLCSC, above n. 1 at para. 1.3.
- [91.](#) The maximum sentence for manslaughter is 25 years (Crimes Act 1900, s. 24).
- [92.](#) *R v Singh* (2012) NSWSC 637 at [30].
- [93.](#) NSWLCSC, above n. 1 at paras 6.30 and 6.114.
- [94.](#) *Ibid.* at para. 6.41.
- [95.](#) *Ibid.* at para. 6.41.
- [96.](#) *Ibid.* at paras 6.36 and 6.46.
- [97.](#) NSWLCSC, above n. 1, submission by Dr Kaye-Fitz Gibbon, 14.
- [98.](#) *Ibid.* at para. 6.112.
- [99.](#) *Hansard*, HL Deb, 26 October 2009 (Lord Bach). See also *R v Clinton* [2012] EWCA Crim 2 at [43].
- [100.](#) NSWLCSC, above n. 1 at para. 6.123.
- [101.](#) *Hansard*, HL Deb, 26 October 2009 (Lord Bach). See also *R v Clinton* [2012] EWCA Crim 2 at [43].
- [102.](#) Reed and Wake, above n. 76 at 129; Wake, above n. 8; S. Parsons, ‘Trigger for Murder: Loss of Control and Sexual Infidelity’, *Chartered Institute of Legal Executives Journal*, April 2012.
- [103.](#) NSWLCSC, above n. 1 at para 6.4.
- [104.](#) *Ibid.* at para. 102, submission by Dr Kaye-Fitz Gibbon, Response to options paper p. 12. See also N. Cobb, ‘*R v Clinton*: Loss of Control and Sexual Infidelity’ (2012) available at: <http://inherentlyhuman.wordpress.com/2012/01/20/r-v-clinton-loss-of-control-and-sexual-infidelity/>, accessed 15 October 2013; Baker and Zhao, above n. 65; Baird, above n. 82.
- [105.](#) *C (A Minor) v DPP* [1996] AC 1 at 28.
- [106.](#) *Ibid.*
- [107.](#) The rebuttable presumption of *doli incapax* was subsequently abolished by statutory intervention. Section 34 of the Crime and Disorder Act 1998 provides: ‘The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished’. See also *R v JTB* [2009] UKHL 20.

- [108.](#) [1995] 1 AC 482, HL.
- [109.](#) Ibid. at 489.
- [110.](#) In the context of excessive and unreasonable force, see s. 76 of the Criminal Justice and Immigration Act 2008, as amended by the Crime and Courts Act 2013, s. 43, which provides: 'where the case is one involving a householder the degree of force used by the householder is not to be regarded as having been reasonable in the circumstances as the householder believed them to be if it was grossly disproportionate'. The provision implies that a householder will be able to use force which is disproportionate, but not grossly disproportionate, in self-defence. This does not alter the principle that self-defence is an affirmative rather than a partial defence. For further discussion, see Wake, above n. 4. See also C. Elliott, 'Interpreting the Contours of Self-Defence within the Boundaries of the Rule of Law, the Common Law and Human Rights', Paper presented at the Society of Legal Scholars Annual Conference 2013 (abstract available at <http://archive.legalscholars.ac.uk/edinburgh/abstract.cfm?id=4>, accessed 15 October 2013); L. Bleasdale-Hill, 'Justifying the Use of "Grossly Disproportionate Force" in a Place of Residence', Paper presented at the Society of Legal Scholars Annual Conference 2013 (abstract available at <http://archive.legalscholars.ac.uk/edinburgh/abstract.cfm?id=37>, accessed 15 October 2013).
- [111.](#) *R v Clegg* [1995] 1 AC 482 at 491-2.
- [112.](#) Ibid. at 495 (citing Viscount Dilhorne).
- [113.](#) [1992] 1 AC 559.
- [114.](#) Sir Matthew Hale, *History of the Pleas of the Crown* (1736), vol. 1, ch. 58, p. 629.
- [115.](#) *R v R* [1992] 1 AC 559 at 608.
- [116.](#) Above n. 115 at 611.
- [117.](#) *R v Clegg* [1995] 1 AC 482 at 500 *per* Lord Simon: 'I am not averse to judges developing law, or indeed making new law, when they can see their way clearly, even where questions of social policy are involved. A good recent example would be the affirmation by this House of the decision of the Court of Appeal (Criminal Division) that a man can be guilty of raping his wife (*Reg. v. R.* [1992] 1 A.C. 599)'.
- [118.](#) *R v Clegg* [1995] 1 AC 482 at 500.
- [119.](#) [2012] EWCA Crim 2.
- [120.](#) *C (A Minor) v DPP* [1996] AC 1.
- [121.](#) Ibid.
- [122.](#) Baird, above n. 82.
- [123.](#) NSWLCSC, above n. 1. Exclusionary conduct models are operative in other jurisdictions (see, e.g., the Northern Territory and the Australian Capital Territory) and many support the introduction of an exclusionary conduct model to New South Wales, including the NSW Bar Association, the Law Society of NSW, the Public Defender's Office and the NSW Council for Civil Liberties: NSWLCSC, above n. 1 at para. 6.40.
- [124.](#) Ibid. at para. 6.43. A number of Inquiry participants advocated that 'words alone' should be excluded from forming the basis of a provocation claim. At present s. 23 of the Crimes Act 1900, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s23.html, accessed 15 October 2013, allows provocation claims on the basis of words alone (see, e.g., *R v Lees* [1999] NSWCCA 301 at [37], *per* Wood CJ at CL). Mere words of abuse or insult would not usually qualify, but threats of violence, extortion, blackmail, etc. may be sufficient. There are significant problems with excluding words alone from the assessment of provocation since words used often provide a contextual ambit to provocation claims: NSWLCSC, above n. 1 at para. 6.73. Domestic abuse commonly involves verbal, emotional and psychological factors and as a result delimiting the concessionary mitigation so as to exclude 'words' could have a significant impact on battered women: 'If you look at the history of the killing of women, in just about every case of the killing of a woman by an intimate partner it revolves around the notion that the woman might leave the relationship or is expressing a desire to leave the relationship. So when people say it is about words and a person responds and says, "No, it is never about words", I say, "Yes, it is about words". It is words like "I want to leave you", it is words like "I am not happy with the way you are treating me". I will bet that is what was at the bottom of *R v Singh* --that Manpreet Singh would have been saying to her man, "I am not happy with you and I am thinking of leaving you." So the kind of words that would be applicable to men in wife-killing cases can be defined I think, and that would be part of the process' (NSWLCSC, above n. 1 at para. 6.78). Fortunately the NSWLCSC deemed such an exclusionary clause inappropriate.
- [125.](#) This exclusion is heavily modelled on the Queensland approach. See, e.g., s. 304 of the Criminal Code 1899 (Qld), available at http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/s304.html, accessed 15 October 2013.
- [126.](#) NSWLCSC, above n. 1 at para. 6.61: 'The continued use of the partial defence of provocation where killings have occurred in the context of sexual infidelity or a change in the relationship condones and sanctions violence against women. In effect women are being killed for exercising their right to end a relationship'.

- [127.](#) Ibid. at para. 6.60.
- [128.](#) Ibid. at para. 6.61.
- [129.](#) Ibid. at paras 6.66 and 6.70. '[T]he law has allowed men to escape a murder charge in domestic homicide cases by blaming the victim. Ending the provocation defence in cases of "infidelity" is an important law change and will end the culture of excuses': H. Harman quoted in R. Verkaik, 'Judge backs infidelity defence for killers', *Independent*, 7 November 200. 'This defence is our version of honour killings and we are going to outlaw it. We have had the discussion, we have had the debate and we have decided that we are not going to bow to judicial protests ... I am determined that women should understand that we won't brook any excuses for domestic violence ... It is a terrible thing to lose a sister or a daughter, but to then have her killer blame her and say he is the victim of her infidelity is totally unacceptable. The relatives say "he got away with murder" and they're right': H. Harman quoted in G. Hinsliff, 'Harman and Law Lord clash over wife killers', *Guardian*, 9 November 2008. See also A. Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence-- A Victorian Case Study' in N. Grieve and A. Burns (eds), *Australian Women: New Feminist Perspectives* (Oxford University Press: Oxford, 1994).
- [130.](#) *Hansard*, HC Deb, 9 November 2009, col. 90 (David Howarth).
- [131.](#) House of Commons (CJ 01, 2009) above n. 48: '[I]s what is really being got here sexual jealousy and envy, not "infidelity"? If so, why not say so?'.
- [132.](#) NSWLCSC, above n. 1 at paras 9.65-9.67.
- [133.](#) These facts are derived from the case of *Stingel v The Queen* (1990) 171 CLR 312.
- [134.](#) L. Richards, H. Fletcher and D. Jewell, *Independent Parliamentary Inquiry into Stalking Law Reform. Main Findings and Recommendations* (2012), available at <http://www.protectionagainststalking.org/InquiryReportFinal.pdf>, accessed 15 October 2013.
- [135.](#) Sections 111 and 112 of the Protection of Freedoms Act 2012 insert ss 2A, 2B and 4A into the Protection from Harassment Act 1997 to create three stalking offences: s. 2A 'stalking' and s. 4A(1)(b)(i) and (ii) 'stalking causing fear of violence' and 'stalking causing serious alarm or distress'. For an analysis of these offences, see J. Gowland, 'Protection from Harassment Act 1997: The "New" Stalking Offences' (2013) 77 JCL 387. For further information, see the Crown Prosecution Service website, available at http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#a03d, accessed 15 October 2013; Home Office Press Release, 8 March 2012, available at <http://www.gov.uk/government/news/new-offences-of-stalking-announced>, accessed 15 October 2013; Home Office Circular 018/2012, 16 October 2012, available at <http://www.gov.uk/government/publications/a-change-to-the-protection-from-harassment-act-1997-introduction-of-two-new-specific-offences>, accessed 15 October 2013.
- [136.](#) Crown Prosecution Service, *Interim Guidelines on Prosecuting Cases Involving Communications Sent via Social Media*, 19 December 2012, available at http://www.cps.gov.uk/consultations/social_media_consultation.pdf, accessed 15 October 2013. The Law Commission is also currently considering 'social media and the criminal law' as a potential project for its 12th Programme of Law Reform, see <http://lawcommission.justice.gov.uk/consultations/our-ideas.htm>, accessed 15 October 2013.
- [137.](#) Home Office Circular, *A Change to the Protection from Harrassment Act 1997*, Home Office Circular 018/2012, available at <https://www.gov.uk/government/publications/achange-to-the-protection-from-harassment-act-1997-introduction-of-two-new-specificoffences>, accessed 15 October 2013.
- [138.](#) See generally E. Finch, *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution* (Routledge-Cavendish Publishing: Abingdon, 2001).
- [139.](#) Law Commission, above n. 60 at para. 3.150; *R v Smith (Morgan)* [2001] 1 AC 146 at 169.
- [140.](#) Coroners and Justice Act 2009, s. 54(6).
- [141.](#) *Hansard*, HC Deb, 9 November 2009, cols 85-95.
- [142.](#) *R v Clinton* [2012] EWCA Crim 2 at [13]-[14].
- [143.](#) See D. Ormerod, *Smith and Hogan's Criminal Law* (Oxford University Press: Oxford, 2011) 521. See also Reed and Wake, above n. 76 at 117: 'At a practical level, the constrained exclusion in the Coroners and Justice Act 2009 of things done or said that constitute sexual infidelity will create interpretational difficulties, and reveals drafting of a tautological and imprecise nature. It is difficult, if not impossible, to countenance how something "verbal" is embodied as occurrence/action of constituents of sexual infidelity. It may be that purposive meaning is attached whereby things said relating to the infidelity fall within the confines of the section, but it is unfortunate that this matter has been expressed opaquely.'
- [144.](#) NSWLCSC, above n. 1 at para 6.101. *R v Clinton* was heard by the Court of Appeal. The Supreme Court replaced the House of Lords following the implementation of the Constitutional Reform Act 2005.
- [145.](#) NSWLCSC, above n. 1 at para. 4.39 (Dr Justin Koonin).

- [146.](#) Ibid. at para. 6.50.
- [147.](#) Ibid. at para. 4.39 (Dr Justin Koonin). See also A. Howe, 'More Folk Provoke their Own Demise (Revisiting the Provocation Debate Courtesy of the Homosexual Sexual Advance Defence)' (1997) 19 *Sydney Law Review* 366.
- [148.](#) NSWLCSC, above n. 1 (NSW Gay and Lesbian Rights Lobby).
- [149.](#) Hereinafter, 'ACT'.
- [150.](#) Crimes Act 1900 (ACT), s. 13(3), available at: http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s23.html, accessed 15 October 2013.
- [151.](#) NSWLCSC, above n. 1 at para. 9.69.
- [152.](#) Ibid. at para. 7.137.
- [153.](#) Ibid., recommendation 7.
- [154.](#) Ibid. at para. 6.60.
- [155.](#) Ibid. at para. 6.64.
- [156.](#) NSWLCSC, above n. 1 at para. 6.62.
- [157.](#) Ibid. at para. 6.38. See also, K. Fitz-Gibbon, 'Provocation in New South Wales: The Need for Abolition' (2012) 45 *Australian and New Zealand Journal of Criminology* 194.
- [158.](#) NSWLCSC, above n. 1 at paras 6.53-6.54. See generally A. Howe, 'Reforming Provocation (More or Less)' (1999) 12 *Australian Feminist Law* 127.
- [159.](#) Section 169 of the Crimes Act 1961 (manslaughter by reason of provocation) was abolished by the Crimes (Provocation Repeal) Amendment Act 2009 following the case of *Clayton Robert Weatherston v The Queen* [2011] NZCA 276. For an analysis of the case, see Wake, above n. 43. See also *Hamidzadeh v R* [2012] NZCA 550 (28 November 2012).
- [160.](#) The Criminal Code Amendment (Abolition of the Defence of Provocation Bill) repealed s. 160 of the Criminal Code Act 1924.
- [161.](#) *Buckner's Case* [1655] Style 467 at 469. See also *Oneby* [1727] 2 Ld Raym 1485 at 1494-5.
- [162.](#) Director of Public Prosecutions, *Annual Report* (2000-2001), available at: http://www.crownlaw.tas.gov.au/_data/assets/pdf_file/0003/89265/ar2000-01.pdf, accessed 16 October 2013.
- [163.](#) J. Tolmie, 'Defence of provocation has its place', *New Zealand Herald*, 7 September 2009, available at http://www.nzherald.co.nz/justice-system/news/article.cfm?c_id=240&objectid=10595632, accessed 16 October 2013.
- [164.](#) [1989] Crim LR 340.
- [165.](#) It has been suggested that following s. 54(1)(2) of the 2009 Act, it is no longer appropriate to interpret the 'loss of control' requirement literally and that the partial defence is now concerned with the circumstances in which the defendant killed. Livings has suggested that, in light of this change, it is possible that a person of 'ordinary tolerance and self-restraint' (s. 54(1)(c)) might kill in the circumstances arising in cases like that of *Cocker*: B. Livings, 'A Partial Defence for the Mercy Killer Who Loses Control?', Paper delivered at the Society of Legal Scholars Annual Conference in Edinburgh, 2013. Abstract available via the following link <http://www.conference.legalscholars.ac.uk/edinburgh/download.cfm?id=164>, accessed 16 October 2013. See also R. Fortson QC, 'Homicide Reforms under the CAJA 2009' Criminal Bar Association of England and Wales, 16 October 2010, para. 95, available at http://www.rudifortson4law.co.uk/legaltexts/HomicideOffences_CBA_handout_for_16thOct2010_R_Fortson_submitted_v.7.pdf, accessed 16 October 2014.
- [166.](#) Tolmie, above n. 164. See also the case of *R v Inglis* [2010] EWCA Crim 2637, [2010] All ER (D) 140 (Nov) where a mother injected her son with a fatal dose of 'heroin so that his life could be ended to take him out of his misery and end his pain' and *R v Inglis* (2011) 75 JCL 105, commentary by P. Dargue.
- [167.](#) D. Lomas, 'A Law Both Hated and Haired', *New Zealand Listener*, Issue 3611, 25 July 2009, available at <http://www.listener.co.nz/commentary/a-law-both-hated-haired/>, accessed 16 October 2013.
- [168.](#) G. Orchard, 'Homicide' in N. Cameron and S. France (eds), *Essays on Criminal Law in New Zealand: Towards Reform?* (Victoria University of Wellington Law Review in conjunction with Victoria University Press: Wellington, 1990) 149.
- [169.](#) A. Simester and R. Sullivan, *Criminal Law Theory and Doctrine*, 4th edn (Hart Publishing: Oxford, 2010).
- [170.](#) J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217, 244-6. In New Zealand 'the abolition of the partial defence of provocation has the consequence that culpable homicides are to be treated as murder and offenders are to be sentenced accordingly': *Hamidzadeh v R* [2012] NZCA 550 (28 November 2012).

- [171.](#) See NSWLCSC, above n. 1 at para. 6.63, citing the New South Wales Director of Public Prosecutions, available at <http://www.parliament.nsw.gov.au/provocationcommittee>, accessed 16 October 2013.
- [172.](#) *Hansard*, HC Deb, 9 November 2009, cols 85-86 (Mr Grieve).
- [173.](#) Dr Crofts and Dr Loughnan assert that ‘such a provision will make it clear that there is no “automatic” right for the partial defence, once raised, to go to the jury and considers that this may operate as a form of safeguard, not least because it may increase the likelihood of the Crown arguing the strength of evidence of provocation in the early stages’: NSWLCSC above n. 1 at para. 9.85.
- [174.](#) NSWLCSC, above n. 1, recommendation 9.
- [175.](#) Law Commission, above n. 60. See also the Coroners and Justice Act 2009, s. 54(5).
- [176.](#) *Hansard* HC Deb, 9 November 2009, col. 88 (Mr Grieve).
- [177.](#) Reed and Wake, above n. 76.
- [178.](#) Coroners and Justice Act 2009, s. 54(6) provides as follows: ‘sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply’.
- [179.](#) The NSWLCSC similarly recommends ‘[t]hat the NSW Government introduce an amendment to section 23 of the Crimes Act 1900 to provide that a judge should not be required to leave a defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply’: NSWLCSC, above n. 1, recommendation 9.
- [180.](#) Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, Consultation Paper CP19/08, 28 July 2008, para. 22.
- [181.](#) *R v Asmelash* [2013] EWCA Crim 157.

Publication (vii)

‘Anglo-Antipodean Perspectives on the Positive Restriction Model and Abolition of the Provocation Defence’ in *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholars Publishing, 2015) 365-405.

CHAPTER FOURTEEN

ANGLO-ANTIPODEAN PERSPECTIVES ON THE POSITIVE RESTRICTION MODEL AND ABOLITION OF THE PROVOCATION DEFENCE

NICOLA WAKE¹

Introduction

The Crimes Amendment (Provocation) Act 2014 (NSW) received assent from the New South Wales Governor on the 20th May 2014.² The Act represents a marked departure from the New South Wales Legislative Council Select Committee's Report. Less than one year earlier the Legislative Council proposed a new partial defence modelled closely on recommendations of the Law Commission of England and Wales in its reports on homicide and the partial defences to murder, and sections 54-56 of the Coroners and Justice Act 2009 as subsequently implemented.³ The

¹ Senior Lecturer, Northumbria University ISSN: XXXXXXXX. I am grateful to Professor Alan Reed (Associate Dean for Research and Innovation, Northumbria University), Dr Arlie Loughnan (Associate Professor, University of Sydney), Professor Thom Brooks (University of Durham), Ben Livings (Senior Lecturer, University of New England) and Emma Smith (Lecturer, University of Northumbria) for their comments on earlier drafts of this chapter. Any errors or omissions remain my own.

² Crimes Amendment (Provocation) Act 2014 (NSW), schedule 1. The Act substitutes section 23 of the Crimes Act 1900, with an entirely new provision, considered further below. Hereinafter, the '2014 Act'.

³ See, respectively, NSW Legislative Council Select Committee, *The Partial Defence of Provocation* (NSW LCSC, 2013)

<[http://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/61173c421853420aca257b5500838b2e/\\$FILE/Partial%20defence%20of%20provocation_Final%20report.pdf](http://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/61173c421853420aca257b5500838b2e/$FILE/Partial%20defence%20of%20provocation_Final%20report.pdf)> accessed 19 April 2014; Law Commission for England and

provisions of the 2014 Act are designed to provide a more restricted partial defence, whilst ensuring that the mitigation remains available to victims of long-term abuse.⁴ Despite the aims of the Committee and the New South Wales government, the wording of the 2014 Act potentially risks rendering the defence unworkable.⁵

The New South Wales Legislative Council Select Committee (the 'Committee') was established by the Legislative Council to inquire into, and report on, the partial defence of provocation and the adequacy of self-defence for victims of prolonged domestic and sexual violence.⁶ A significant number of inquiry participants favoured abolition on grounds, *inter alia*, that the defence is antediluvian, inherently gender biased, and it suggests that the victim was in some way responsible for their death.⁷ The recent New South Wales Supreme Court decision in *Hassan*⁸ is the latest in a number of controversial cases, which contextualises the view that the current formulation of the defence privileges male angered states.⁹ 54-year-old Hassan stabbed his 24-year-old wife to death because, according to his evidence, she had declared that he was not a man, the children were not his, but another man's, and these words were accompanied by swearing on her part. Hassan was convicted of manslaughter, and sentenced to a maximum term of imprisonment of 12 years, with a minimum non-parole period of nine years. This case adds to the expanding number of injustices meted out via the partial defence, and further fuels

Wales, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006); Law Commission for England and Wales, *Partial Defences to Murder* (Law Com No 290, 2004); Sections 54-56 of the Coroners and Justice Act 2009 were brought into force on 4 October 2010 (Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010 (SI 2010 No. 816)) (Hereinafter, the '2009 Act').

⁴ NSW Legislative Council, 5 March 2014, page 27033.

⁵ Kate Fitz-Gibbon, 'Kate Fitz-Gibbon responds to NSW provocation law reform' (*Deakin Blogs*, 15 Nov 2014) <<https://blogs.deakin.edu.au/criminology/kate-fitz-gibbon-responds-to-nsw-provocation-law-reform/>> accessed 19 April 2014.

⁶ The Committee (n 3) paras 1.1 and 1.5-1.8.

⁷ *Ibid* para 1.19. See, generally, Jenny Morgan, 'Provocation law and facts: dead women tell no tales, tales are told about them' (1997) 21 Melbourne University Law Review 237.

⁸ [2014] NSWSC 280.

⁹ See also, *Singh* [2012] NSWSC 637; *Stevens* [2008] NSWSC 1370; *Green* [1997] HCA 50.

calls for its abolition.¹⁰ There is merit, however, in retaining the partial defence, pending a comprehensive review of homicide law, particularly in cases involving abused defendants. Retention of the defence should be complemented by reform to the law on self-defence, in order to more appropriately accommodate the circumstances of the abused victim who kills her abuser in order to thwart an anticipated attack which was not immediately imminent.¹¹ The argument that such issues could be adequately dealt with at the sentencing stage, as it is with all other criminal offences, fails to address the significant stigma attached to the murder label, and the importance of juror input in determining whether a manslaughter label should be attached in light of the circumstances of the case.¹²

This chapter consists of four parts. Part I provides a background to the 2014 Act reforms. It explores the potential overlap between the partial defences of provocation/loss of control and substantial impairment by abnormality of mind/diminished responsibility in cases involving the abused defendant who kills. The recognition of battered woman syndrome (considered further below) resulted in a divergence in approach relating to the way these defences could apply to the abused defendant. In England and Wales, the judiciary focused on the clinical aspect of the syndrome, whereas in New South Wales the syndrome was utilised to illustrate how abused defendants might have felt the need to act out of self-preservation. The former approach operated to psychologise the abused defendant, whilst the latter offered a more empathically valid assessment of the circumstances of the abused defendant. Despite the ostensible shift away from the psychologisation of women in relation to the partial defences, I argue that current and former iterations of the provocation defence are demonstrably unsuited to this type of case, and that a common failure to understand the circumstances of those who kill their abusers is partially to blame for the problems associated with the way the law deals with this type of case within these jurisdictions.

Part II advances a critical review of the 2014 Act, comparing it to the 2009 loss of control defence in England and Wales. The retention of the

¹⁰ Kate Fitz-Gibbon, 'The injustice of the provocation defence in NSW continues' (*Deakin Blogs*, 24 March 2014) <<https://blogs.deakin.edu.au/criminology/the-injustice-of-the-provocation-defence-in-nsw-continues/>> accessed 19 April 2014.

¹¹ The Committee (n 3) paras 1.19-1.20.

¹² *Ibid* para 1.19. See, generally, Kate Fitz-Gibbon, 'Provocation in New South Wales: The need for abolition' (2012) 45 *Australian and New Zealand Journal of Criminology* 194, 207.

loss of self-control requirement within both jurisdictions fails to adequately accommodate the circumstances of the abused defendant, who will often be acting in a state of fear. The imperfect coalition between these ostensibly polarised psychological states is counterintuitive and apt to cause juror confusion. The difficulties associated with raising the partial defence in New South Wales are further exacerbated under the 2014 Act by virtue of the requirement that the provocative conduct amount to a serious indictable offence. Several hypothetical scenarios are posited in order to highlight the controversial and arbitrary nature of the new provision. I argue that these reforms will potentially leave the abused killer bereft of a defence in cases where there ought to be a defence available.

Part III compares the 2014 Act with the position in New Zealand where the partial defence has been abolished, and suggests that abused defendants in New South Wales may find themselves in a similar position to those in New Zealand given the restrictive ambit of the new plea. The controversial case of *Wihongi* (considered below) illustrates the injustice that is borne out of dealing with an abuser's provocation at the sentencing stage. I contend that New Zealand's abolition of the provocation defence has simply shifted the problems associated with provoked killings to the sentencing stage of trial, and the case of *Wihongi* shows a worrying lack of awareness of the circumstances of domestic abuse within the criminal justice system.

Part IV provides an overview of the law in Victoria where a bespoke family violence provision has been operating since 2005, and has recently been extended to cover other offences.¹³ This part demonstrates the benefits of the Victorian approach and highlights how it could be tailored to benefit the criminal justice systems of England and Wales, New South Wales, and New Zealand, despite their very disparate approaches to provocative conduct. Although not a panacea for the ills associated with the law in this area, the provision of social framework evidence and an education package are vital in order to begin to adequately address the circumstances of those who kill their abusers.

¹³ This comparative analysis with the common law state of Victoria is apt because, like New Zealand, Victoria has also abolished the provocation defence. In the years 2000-2010, Victoria has also had more battered women cases than the code states of Western Australia and Tasmania, the other two Australian States to abolish the defence; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?' (2012) 45(3) Australian and New Zealand Journal of Criminology 383, 385.

I. Background: Problems with the Provocation Defence

There have always been fundamental issues with the operation of the provocation defence in both England and Wales and NSW, particularly in relation to those who kill their abusers. Traditionally, the position in England and Wales operated to psychologise the conduct of the abused woman, whilst the approach in NSW was to assist jurors in understanding the circumstances of the abused defendant. Although the latter approach is to be preferred, the loss of control requirement which was, and remains integral, to former and current iterations of the partial defence in both jurisdictions render the extreme provocation and loss of control defences demonstrably unsuited to the circumstances of those who kill their abusers.

Given their similarities it is not uncommon for the partial defences (extreme provocation and substantial impairment by abnormality of mind in NSW, and loss of control and diminished responsibility in England and Wales) to be raised simultaneously.¹⁴ This is particularly true in cases involving abused defendants where the cumulative impact of that abuse has resulted in a recognised medical condition.¹⁵ In England and Wales, recognition of battered woman syndrome permitted the introduction of medical expert evidence to help juries to understand the psychological effects of domestic abuse, whilst contemporaneously depicting the abused defendant as extraordinary or irrational. The availability of the diminished responsibility plea resulted in the abused defendant having her case portrayed in a way which suggested that she was pathological, rather than acting reasonably in the circumstances.¹⁶ Although a cycle of abuse may result in a psychological condition, this is not always the case and the categorisation of the abused woman who kills as ‘less rational rather than less culpable’ is inherently unfair.¹⁷

¹⁴ Crimes Act 1900 (NSW), sections 23 and 23A as amended by the Crimes Amendment (Provocation) Act 2014 (NSW); and, Coroners and Justice Act 2009, sections 54-55; and, Homicide Act 1957 section 2(1) as amended by section 52 the Coroners and Justice Act 2009, respectively.

¹⁵ The Committee (n 3) para 2.48 citing The Hon James Wood AO QC.

¹⁶ The Court of Appeal, in *Ahluwalia*, suggested that the effect was to describe the abused defendant as ‘a different person from the ordinary run of [women]’; *Ahluwalia* (1992) 4 AER 899 citing *McGregor* [1962] NZLR 1069. See, generally, Anne Worral, *Offending Women* (Routledge, 1990) 31.

¹⁷ The Committee (n 3) para 2.49 citing Professor Julie Stubbs. See, generally, Lenore Walker, *The Battered Woman Syndrome* (Harper and Row, 1979); Celia

In contrast, the New South Wales Supreme Court in *Hickey*¹⁸ adopted a more empathetically valid approach, which viewed the syndrome as a means of explaining why the defendant might have reacted in the way that she did. The defendant had been in a relationship with the victim for a number of years, during which she had frequently been beaten. It was during the course of a physical fight, in which she had been thrown onto the bed and head-butted, that she finally killed her abuser. Although more frequently utilised to explain the temporal divide between the provocative conduct and the killing, battered woman syndrome was instead used to explain why the defendant had been unable to leave the relationship.¹⁹

Later cases in England and Wales recognised that the provocation defence ought to be made available to the abused defendant, and the House of Lords advocated that battered woman syndrome could be considered a relevant characteristic when determining how the hypothetical reasonable person might have reacted in response to a particular type of provocative conduct.²⁰ More recently, the House of Lords, the Privy Council, and the Law Commission for England and Wales (the 'Commission') observed that the overlap between provocation and diminished responsibility, coupled with a lack of statutory recognition that the former defence ought to be available to certain defendants who kill in fear, was becoming increasingly problematic.²¹

The introduction of a novel loss of control defence, which is triggered, in part, by a fear of serious violence, was designed to assist in divorcing provocation/loss of control from diminished responsibility claims in

Wells, 'Battered Woman Syndrome and Defences to Homicide: Where Now?' (1994) *Legal Studies* 266; and Stanley Yeo, 'Battered Woman Syndrome in Australia' (1993) 143 *New Law Journal* 13.

¹⁸ (1992) 16 *Crime LJ* 271.

¹⁹ For further discussion see, Patricia Easteal, 'Translating Women's Experiences: The Need for Expert Witnesses in the Court' (*Australian Institute of Criminology*) <http://www.aic.gov.au/media_library/conferences/medicine/peasteal.pdf>

accessed 19 April 2014. As Crofts and Loughnan identify, 'a successful provocation plea effectively sends a different message about the accused, when compared with a successful substantial impairment plea-despite the formal legal outcome being common in both (manslaughter). In provocation the message encoded in the defence is that an ordinary person could have reacted in the same way the accused did'; Thomas Crofts and Arlie Loughnan, 'Provocation: the Good, the Bad and the Ugly' *Criminal Law Journal* (2011) 37(1) 23.

²⁰ See, for example, *Thornton (no 2)* [1996] 1 *WLR* 1174.

²¹ See, *Smith (Morgan)* [2001] 1 *Cr App R* 5; *Attorney General v Holley* [2005] 2 *AC* 580; and, *Law Com No 290, 2004* (n 3), respectively.

England and Wales. Further amendments made to the diminished responsibility defence mean that the partial mitigation will only apply where the defendant suffers from a recognised medical condition, thereby restricting the availability of the defence for the abused defendant.²² Although this appears to signify a more formal departure from the psychologisation of abused women, the loss of control conceptualisation, which is central to the partial defence, is antithetical to the pattern of psychological and behavioural responses exhibited in relation to long-term physical and emotional abuse. Paradoxically, the partial defence requires the abused defendant to claim that she *feared serious violence* and *lost self-control* in response to the cumulative impact of the domestic abuse.²³

Similar problems have arisen in relation to New South Wales' former provocation defence. The partial defence operated where the defendant suffered a loss of self-control that was induced by any conduct of the victim (including grossly insulting words or gestures) towards or affecting the defendant; and that conduct was such as could have induced an ordinary person in the position of the defendant to have so far lost self-control as to have formed an intention to kill, or to inflict grievous bodily harm upon the victim. The ordinary person test was two-limbed. The first required fact-finders to consider the gravity of the provocation. In this context, the ordinary person was imbued with any relevant characteristics of the defendant, including battered woman syndrome. The second charged jurors to assess the ordinary person's powers of self-control in response to that provocation. Age was a relevant consideration but sexual preference, racial background, physical disability, etc., was not.²⁴

²² See generally, *Dowds* [2012] EWCA 281 (in relation to the recognised medical condition requirement). See also, Nicola Wake, 'Diminished Responsibility; Raising the Bar' (2012) *Journal of Criminal Law* 76(3); *Bunch* [2013] EWCA Crim 2498 (in relation to the need for medical evidence in diminished responsibility cases); and *Gold* [2014] EWCA Crim 748 (in relation to the meaning of 'substantial' in the diminished responsibility defence).

²³ See, generally, Nicola Wake, 'Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives' (2013) *Journal of Criminal Law* 433, 439; Susan Edwards, 'Loss of Self-Control: When His Anger is Worth More than Her Fear' in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2011) 79; *Dawes, Hatter and Bowyer* [2013] EWCA Crim 322 (in relation to the need to consider the cumulative impact of the victim's conduct in order for the abused defendant to be brought within the ambit of the defence).

²⁴ The Committee (n 3) para 2.36.

Akin to provocation/loss of control in England and Wales, the partial defence has been heavily criticised for privileging stereotypically male responses to provocative conduct and thereby tacitly legitimising anger as an excuse to use violence.²⁵ Female defendants who are more prone to slow burn reactions rather than angry outbursts are required to distort their experience in order for it to fit within the partial defence, or risk it being rejected outright.²⁶ The loss of self-control requirement is indicative of a lack of understanding regarding the circumstances and experiences of the abused defendant.

Notwithstanding such criticisms, the government for England and Wales contend that the loss of self-control requirement is essential in order to prevent the defence from being misused in cases of cold-blooded, gang-related or honour killings, and similar concerns impelled the New South Wales government to retain the loss of self-control requisite when enacting the 2014 Act.²⁷ The loss of control conceptualisation is inherently ambiguous, and this is complicated by the fact that it must be considered in light of the cumulative impact of the provocative conduct.²⁸ The imprecise drafting of the legislation means that perplexed jurors will be required to engage in mental gymnastics in order to determine whether the partial defence applies to the abused killer. As Edwards suggests, retention of the loss of control requirement symbolises that 'his anger is worth more than her fear', and it undoubtedly renders it more difficult for the abused defendant to claim the partial defence.²⁹

II. The Crimes Amendment (Provocation) Act 2014

The 2014 Act replaces the provocation defence with a new partial defence of extreme provocation. The New South Wales government rejected the Committee's recommendation that the defence be renamed

²⁵ Ibid para 4.6.

²⁶ Ibid para 4.8 citing the NSW Domestic Violence Committee Coalition, submission 37, 2-3.

²⁷ see, Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (MoJ CP19/08, 2008) para 36; NSW Department of Attorney General and Justice, *Reform of the Partial Defence of Provocation* (2013) <http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_index.html> accessed 24 April 2014, respectively.

²⁸ Law Com No 290, 2004 (n 3) paras 3.28-3.30. See also, *Dawes, Hatter and Bowyer* (n 23).

²⁹ Edwards (n 23) 79.

gross provocation based upon an earlier proposal by the Commission.³⁰ It has been suggested that the term gross might have subjective connotations of something 'crude' or 'unpleasant'.³¹ Although the revision does not represent an outright departure from the provocation label, as has occurred under sections 54-56 of the 2009 Act, it suggests that only particularly serious cases ought to be considered for the purposes of the partial defence.³²

The Committee also adopted the Commission's recommendation that the partial defence should be predicated on a justifiable sense of being seriously wronged.³³ The Committee defined gross provocation as 'words or conduct, or a combination of words or conduct which caused the defendant to have a justifiable sense of being seriously wronged'.³⁴ The New South Wales government, however, rejected this approach in favour of a positive restriction model, which ensures that the partial defence is available only where the provocative conduct amounts to a serious indictable offence (that is, an indictable offence punishable by imprisonment for life or for a term of five years or more).³⁵

The extreme provocation defence has the effect of reducing a murder conviction to one of manslaughter, where the killing was committed in response to the commission of a serious indictable offence against or affecting the defendant. The victim's conduct must have caused the defendant to lose self-control and it ought to be such that it could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm. Where there is evidence of extreme provocation, the burden of proof is on the prosecution to prove beyond reasonable doubt that the act was not done in response to such conduct.³⁶

³⁰ The Committee (n 3) para 9.30; Law Com No 290, 2004 (n 3) para 1.13, respectively.

³¹ *ibid* Law Com No 290, 2004, fn 52; NSW Department of Attorney General and Justice (n 27).

³² Thomas Crofts and Arlie Loughnan, 'Provocation, NSW style: Reform to the defence of provocation in NSW' [2014] Criminal Law Review 109, 113.

³³ The Committee (n 3). See also, Law Com No 290, 2004 (n 3) para 3.70.

³⁴ *Ibid* The Committee, recommendation 5.

³⁵ Crimes Act 1900 (NSW), section 23 (2) (b) as amended by the Crimes Amendment (Provocation) Act 2014 (NSW), schedule 1, and Crimes Act 1900 (NSW), section 4, respectively.

³⁶ Crimes Act 1900 (NSW), sections 23(1)(2)(a)-(d) and (7) as amended by the Crimes Amendment (Provocation) Act 2014 (NSW), schedule one.

(a) Loss of self-control

As noted, the loss of self-control requirement, which formed the basis of the former provocation defence in New South Wales, and is central to sections 54-55 of the 2009 Act, is retained under the 2014 Act. The term has been criticised as ambiguous, lacking a clear basis in science or medicine, and failing to appreciate the true reality of domestic violence.³⁷ Nevertheless, the New South Wales government justify its retention on grounds that the partial defence would be available in undeserving cases if the loss of control requirement were repudiated, particularly given the potentially vast array of circumstances that might induce a justifiable sense of being seriously wronged.³⁸ The loss of control requirement has always been a particularly difficult aspect of the defence for abused killers, since a defendant is much less likely to lose control when they know that is likely that they will 'come off worse' as a result.³⁹

The predicament of abused women is partly addressed in section 23 (4) of 2014 Act, which provides that 'the conduct of the deceased may constitute extreme provocation even if it did not occur immediately before the act causing death'. The omission of the words 'or at any previous time' which appear in the original wording of the defence implies that

³⁷ Commenting on the loss of control requirement, Reilly observed: '[L]oss of control in anger is traditionally characterized by external signs of rage and, in particular, the extremity of the violent response. Fear might be associated with external signs which are not easily detectable; perhaps being characterised more typically by paralysis and submission, while retaining the ability to response [sic] with a single act of homicidal violence'; Alan Reilly, 'Loss of Self-Control in Provocation' [1997] 21 Criminal Law Journal 320, 330. See also, Law Com 290 (n 3) para 3.28; The Committee (n 3) paras 4.97-4.118; and, Edwards (n 23) 88.

³⁸ New South Wales Department of Attorney General and Justice (n 27). Livings noted the potential breadth of the 'seriously wronged' trigger under sections 54-55 of the 2009 Act, when he contended that a sense of being wronged may arise from a particular set of circumstances or decisions taken by individuals or bodies; Ben Livings, 'A New Partial Defence for the Mercy Killer-Revisiting Loss of Control' (2014) Northern Ireland Legal Quarterly 65(2), 187-204, 199. According to Livings, 'a lack of conceptual certainty in the demand for a loss of self-control' coupled with the potentially 'empathic response...of jurors, who are entitled to take a more holistic view of the circumstances of the case' may render the partial defence 'more amenable' in cases which were not traditionally viewed as falling within the ambit of the provocation defence; Ibid 196.

³⁹ Law Com 290, 2004 (n 3) para 3.28.

cumulative provocation will be less relevant to the new plea.⁴⁰ An alternative approach, found within section 54 (2) of the 2009 Act, would be to provide that ‘the loss of control need not be sudden’. The Court of Appeal for England and Wales recently interpreted this to mean that the loss of self-control may follow from the cumulative impact of earlier events.⁴¹ Of course, the lack of a suddenness requirement does make it difficult for jurors to distinguish genuine from disingenuous claims, particularly where there is evidence of deliberation.⁴²

The New South Wales government justify the section 23(4) limitation on the basis that the partial defence should remain unavailable, even where there is a history of abuse, in cases of pre-meditated killing that do not involve a loss of control. The government asserts that this type of case should be dealt with via self-defence or mitigation in sentencing.⁴³ In practical terms, the requirement that the defendant believed that such conduct was *necessary* will usually bar self-defence and excessive self-defence claims in cases of this context. This is because the threat will usually be anticipated, but not sufficiently imminent in order to justify raising either defence.⁴⁴ Unfortunately, the archetypal paradigm of an abused woman killing her abuser may often suggest pre-meditation:

A man told his wife, ‘I stay with you out of pity. Who else would want a barren woman?’ She waited until he fell asleep, before taking a knife and stabbing him to death. She subsequently told police, ‘I am glad I did it, he deserved it!’ He had carried out a long-term campaign of abuse, both

⁴⁰ Gibbon *et al* made this point in relation to the draft Crimes Amendment (Provocation) Bill 2013; Helen Gibbon, Alex Steel, Julie Stubbs and Courtney Young, ‘Submission to the NSW Government on the Exposure Draft Crimes Amendment (Provocation) Bill 2013’ (2013) para 3.1

<http://www.lpcld.lawlink.nsw.gov.au/agdbasev7wr/lpcld/documents/doc/submission_on_edb_julie_stubbs_nov_2013.doc> (accessed 23 April 2014). See also, WEL, ‘The Exposure Draft Crimes Amendment (Provocation) Bill 2013’ (2013) <http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_consultation/lpcld_bills.html> (accessed 24 April 2014).

⁴¹ *Dawes, Hatter and Bowyer* (n 23).

⁴² For problems associated with the repudiation of the suddenness requirement see, Jeremy Horder, ‘Reshaping the Subjective Element in the Provocation Defence’ (2005) *Oxford Journal of Legal Studies* 25, 123; and, Andrew Simester and Bob Sullivan, *Criminal Law, Theory and Doctrine* (Oxford: Hart Publishing, 2nd edition, 2003) 343

⁴³ New South Wales Department of Attorney General and Justice (n 27).

⁴⁴ See, Crimes Act 1900 (NSW), sections 418 and 421.

physical and emotional, against her in response to the miscarriage of their child, which had occurred four years earlier.

The temporal divide between the provocative conduct and the fatal act, the weapon, and the ostensible lack of remorse demonstrated in the foregoing example may suggest revenge. In reality, the fatal conduct is in response to prolonged and systematic abuse, the taunt representing the final straw. The killing is the by-product of a complex combination of emotions including, *inter alia*, fear, desperation, anxiety, anger and low self-esteem.⁴⁵ This contextual appreciation of the plight of the battered woman is essential in distinguishing between intentional killings involving a complex array of inculpatory motives and pre-meditated, non-domestic cases.⁴⁶

In order to avoid unnecessary overlap between extreme provocation and the partial defence of excessive self-defence, the fear of serious violence requirement, within section 55(3) of the 2009 Act, is not included in the 2014 Act.⁴⁷ Ironically, the fact that extreme provocation is predicated on a serious indictable offence in the 2014 Act has the effect of producing a substantial overlap between extreme provocation and affirmative self-defence, depending upon the circumstances of the alleged offence.⁴⁸ In some cases, a defendant will be able to argue that force was *necessary* in response to the serious indictable offence. The victim of abuse is unlikely to be able to make such a claim since she is less likely to lose self-control and attack a physically stronger abuser. Successful attempts are, therefore, more likely to occur when the physically stronger abuser is unaware or off-guard.⁴⁹ The corollary is that it becomes very difficult to establish that she believed that force was *necessary*. Although self-defence and excessive self-defence may be more appropriate defences than provocation in cases involving victims of domestic violence, it is

⁴⁵ See, generally, The New South Wales Domestic Violence Death Review Team Annual Report (2011-2012)

<http://www.coroners.lawlink.nsw.gov.au/agdbasev7/wr/_assets/coroners/m40160115/dvdr Annual_report_final_october_2012x.pdf> (accessed 25 April 2014).

⁴⁶ Edwards made this point in relation to the loss of self-control element which is integral to the loss of control defence in England and Wales (n 23) 89.

⁴⁷ The Committee suggested that the new plea should not include a fear of serious violence prong (n 3) paras 7.94-7.95.

⁴⁸ The New South Wales Department of Attorney General and Justice identified that there is inevitably an overlap between the defences (n 27).

⁴⁹ *Ibid* para 3.28.

clear that the legislation needs to be developed in order to properly accommodate the circumstances of the abused defendant (discussed further in Part IV).⁵⁰

(b) The ‘Ordinary Person’ Test

The 2014 Act is predicated on an objective test, which removes the current requirement for the jury to first consider the degree of provocation from the defendant’s perspective. As previously mentioned, the old provocation defence applied where the conduct of the victim towards the defendant caused the defendant to lose self-control; and that conduct was such as could have induced an ordinary person in the defendant’s position to have so far lost self-control as to have formed an intention to kill or cause grievous bodily harm. The test required fact finders to assess the gravity of the provocation by reference to the ordinary person who has all of the characteristics of the defendant, before considering the objective prong of the defence.⁵¹

Precedent demonstrates the difficulties associated with personalising the ordinary person test. For a period of time in England and Wales, discreditable /creditable characteristics were to be treated alike provided that there was a tautological link between the provocative conduct and the defendant’s characteristics. Repugnant characteristics could be attached to the reasonable person test, provided the condition was permanent (not transitory), and the subject matter of the provocation.⁵² Similar issues have arisen in Model Penal Code States in the US where the courts have been required to consider the defendant’s situation, and in some instances, his

⁵⁰ The Committee (n 3) para 5.60, citing Fox, Zheng, Mata and Bulut.

⁵¹ Original Crimes Act 1900 (NSW), sections 23(2)(a)-(b). In *Stingel*, the court advocated that ‘the preferable approach is to attribute the age of the accused to the ordinary person of the objective test, at least in any case where it may be open to the jury to take the view that the accused is immature by reason of youthfulness’; *Stingel* (1990) 171 CLR 312, 331.

⁵² For further discussion, see, Alan Reed and Nicola Wake, ‘Anglo-American Perspectives on Partial Defences’ in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2010) 199. See also, Andrew Simester and Bob Sullivan, *Criminal Law Theory and Doctrine* (Hart Publishing, 2010) 381.

subjective perspective of the fairness of that situation.⁵³ In *Guevara*⁵⁴ jurors were required to consider the alleged provocation of a wife who had filed for divorce, from the perspective of an unfaithful husband.

The 2009 and 2014 Acts in contrast, engage an objective inquiry whereby fact finders are charged to assess whether a qualifying trigger (or combination thereof) or the extreme provocation (respectively) could have caused an ordinary person to lose self-control. The ordinary person test has been vehemently criticised on grounds that only extraordinary people kill in response to provocation.⁵⁵ In reality, the law does not excuse because the ordinary person kills, but rather because the law recognises reason in the defendant's emotion.⁵⁶ A purely objective inquiry fails to appreciate that most people will be unacquainted with the fear experienced by an abused woman. A contextual narrative combined with elements of individual subjectivity is therefore essential in cases of this nature.

The 2014 Act test will continue to require jurors to engage in mental gymnastics in determining whether some hypothetical ordinary person would have lost self-control.⁵⁷ Given the complexity of the objective test, more specific guidance would have been beneficial, as has occurred in England and Wales.⁵⁸ The purely objective test, which was implemented under the 2009 Act, stipulates that the ordinary person is a person of the defendant's sex and age with a normal degree of tolerance and self-restraint. Further, this objective assessment must be undertaken in light of the defendant's circumstances.⁵⁹

⁵³ See, generally, Victoria Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' *The Yale Law Journal* 106, 1331, 1354. For further discussion of the position in Model Penal Code States see Reed herein at chapter seven.

⁵⁴ 521 NYS2d 292 (App Div 1987).

⁵⁵ The Committee (n 3) para 4.132 citing Graeme Coss.

⁵⁶ See, generally, Nourse (n 53) 1338. See also, Reed herein at chapter seven.

⁵⁷ Commenting on the ordinary person test generally; Victorian Law Reform Commission, *Defences to Homicide* (VLRC Final Report, 2004) page 35.

⁵⁸ Crofts and Loughnan (n 32) 117.

⁵⁹ Coroners and Justice Act 2009, section 54(1)(c). For further discussion of the 'ordinary person' test see, *Asmelash* [2013] EWCA Crim 157. Crofts and Loughnan highlight the potential incompatibility between excluding specific forms of conduct from the partial defence, and then requiring jurors to evaluate the defendant's circumstances; 'Provocation: the Good, the Bad, and the Ugly' (n 19).

(c) A Positive Restriction Model: The ‘Serious Indictable Offence’ Requirement

The 2014 Act further mandates that the partial defence will only be available where the conduct of the victim amounted to a serious indictable offence. The New South Wales government suggests that this positive restriction provides a workable model for excluding certain forms of conduct from the concept of extreme provocation.⁶⁰ The Committee’s preferred approach was predicated on an exclusionary conduct model which would render the defence unavailable, ‘other than in cases of a most extreme and exceptional character’ in several specified domestic situations including, *inter alia*, where the provocation is ‘based on anything done by the deceased or anything the defendant believes the deceased has done’ to end or change the nature of the relationship.⁶¹ The New South Wales government, however, were unconvinced that the exclusionary conduct model would be effective in achieving the Committee’s policy objectives, citing the problems associated with the notorious sexual infidelity prohibition under section 55(6) of the 2009 Act in this regard.⁶² Further the lack of definitional clarity pertaining to circumstances of ‘an extreme and exceptional’ character is *ostensibly* absent from the notion of a serious indictable offence, which is clearly defined in statute.

From a US perspective, Nourse has previously argued that the partial defence should only be available in cases where the provocative conduct amounts to a criminal offence. For Nourse, this would align the defendant’s emotional misconduct with legal notions of retribution, thereby avoiding the inherent contradiction in punishing the emotions implied through legal judgments (that criminal offences are wrong and worthy of retribution).⁶³ The same arguments cannot be made for the defendant who kills in response to separation or arguments regarding childcare:

When a defendant responds with outrage to wrongs society punishes, he asks us to believe that he has legislated nothing. However, when a defendant responds with outrage to conduct society protects [departure, for instance], he seeks to supplant the State’s normative judgment, to impose

⁶⁰ New South Wales Department of Attorney General and Justice (n 27).

⁶¹ The Committee (n 3) para 9.75.

⁶² New South Wales Department of Attorney General and Justice (n 27).

⁶³ Nourse (n 53) 1392-3

his individual vision of blame and wrongdoing not only on the victim, but also on the rest of us.⁶⁴

In this respect, the partial defence would be unavailable where the defendant's emotional response does not coincide with the law in terms of those acts that ought to be punished. This approach queries whether the victim's behaviour was contrary to law, rather than the defendant's individual sense of wrongfulness *per se*. The defendant's outrage may be warranted, depending upon several factors including, *inter alia*, whether the defendant had induced the victim's conduct and also whether the outrage was genuine and proportionate to the actions of the victim.⁶⁵ Nourse is of the view that partial condemnation illustrates that the law remains unprepared to condone the conduct of those who take the law into their own hands. The defence would be completely excluded where the victim would not have expected legal punishment for the provocative conduct, for example, leaving an abuser.⁶⁶

Nourse's attempt to introduce a more coherent structure to the defence is to be commended, but it lacks credibility.⁶⁷ The emphasis on criminal conduct is arbitrary, and it fails to recognise the many different forms of (not necessarily criminal) conduct that may provoke an individual to lose self-control.⁶⁸ Horder illustrates the haphazard nature of a provocation defence based upon the victim's alleged criminal conduct, by reference to the law in Michigan, where it is a criminal offence for any man to seduce and debauch an unmarried woman, and Arizona, where adultery is criminalised.⁶⁹ If Nourse's proposals were to become law, a paramour's alleged infidelity could amount to provocation in law where the infidelity constituted the seduction and debauchment of an unmarried woman or where such infidelity was adulterous, depending upon the state.⁷⁰ Limiting the scope of the provocation defence to a particular category of offence

⁶⁴ Ibid.

⁶⁵ Ibid 1397. Nourse refers to this as 'warranted excuse'.

⁶⁶ According to Nourse, '[j]udges must not only evaluate, they must be convinced that a law that, in effect, embraces divorce and moving out as 'emotional wrongs' cannot coexist in a world which the law permits women to divorce and separate.' Ibid 1394, and 1401.

⁶⁷ Horder (n 42) 123.

⁶⁸ Ibid Horder.

⁶⁹ Ibid Horder. See also, Michigan Comp Laws Ann s750.532. (punishable by up to five years imprisonment); Ariz Rev State 13-1408 (2001).

⁷⁰ Ibid Horder.

would not serve to eradicate the arbitrariness found within this approach, nor is the problem resolved by Nourse's suggestion that the criminal offence criterion for provocation to go to the jury should be viewed as 'a guide...not a doctrinal standard'.⁷¹

These criticisms are levelled at the potential cross-state application of Nourse's proposal, but similar criticisms may be made of the 2014 Act. The 2014 Act embraces Nourse's conceptual framework, but raises the bar higher by virtue of the serious indictable offence requirement. Whilst Nourse would leave it to courts and juries to determine whether the victim's illicit conduct is capable of satisfying the partial defence, the 2014 Act mandates that the victim's actions constitute a serious indictable offence before the partial defence is engaged. It does not automatically follow that an act, which is punishable for life or a term of five years or more, would be one that ought to trigger the partial defence. Similarly, the fact that the victim's alleged conduct is not deemed to be criminal does not mean that it is any less provocative. Indeed, there may be many cases in which society would deem that the partial defence should be available to the defendant, irrespective of whether the victim's conduct amounts to a serious indictable offence. In equal measure, there will undoubtedly be cases where society deems it inappropriate to allow the partial defence, despite the alleged criminal conduct of the victim.

The following scenarios have been drafted in order to demonstrate the latent problems associated with a partial defence predicated on the victim's alleged criminal conduct; the difficulties associated with the serious indictable offence requirement; and, ultimately, to illustrate the conceivable injustices that may arise from the tightly constrained ambit of the partial defence:

- (i) V tells his wife (D) that he has had/intends to have sexual intercourse with her 18-year-old daughter (his step-daughter). D knows that her daughter did not/would not consent. Whereupon D loses self-control and beats V to death ('The representation').
- (ii) D was married to V as part of an arrangement between their parents. V did not want to marry D and blamed her for the arrangement. One week prior to the wedding, V brutally assaulted D both physically and sexually. D confided in her sister, but afraid of angering their father neither one told their parents of the abuse. During the course of the marriage, V was repeatedly unfaithful, and verbally and physically abusive to D. One day,

⁷¹ Ibid Horder; Nourse (n 53) 1396, Fn 381.

V asked if D had ever considered taking her own life. He asserted that she was a drain on both him and her family and that it would be better for everyone if she killed herself. That evening, D waited until V was asleep before stabbing him to death ('Excessive taunting').

(iii) D returns home to find his wife (V) in *flagrante delicto* with his brother. D's brother pushes past D and runs from the house. In a fit of fury, D proceeds to pack V's clothes into a suitcase. When D ignores V's pleas for him to stop she becomes frustrated and responds by slapping D in the face, bursting his lip. D loses self-control and strangles V to death ('Sexual infidelity plus').

(iv) D invited her cousin (V) to live with her when he lost his job as a result of the recession and his house was subsequently repossessed. D became suspicious that V had been abusing her two young children. D discovered V masturbating in front of her 11-year-old daughter. She lost self-control, removed a knife from the kitchen drawer and stabbed V to death⁷² ('Act of indecency').

The term serious indictable offence fails to include representations (extremely insulting words or gestures) by the victim that he had or intended to commit a serious indictable offence.⁷³ On this basis, it is likely that the representation made in scenario (i) would be insufficient to amount to extreme provocation, irrespective of whether V had actually committed an offence. The wording of the statutory provision is unclear as to whether D has to witness the alleged offence (as in scenario (iv)), in order for the partial defence to apply. The cases of *Thorpe*⁷⁴ and *Davis*⁷⁵, which predate the 2014 Act required that the conduct occurred in the defendant's sight or hearing, but, in relation to the latter requirement, extremely insulting words or gestures formed part of the provocation

⁷² This example is derived from the case of *R v KMB* [2003] NSWSC 862 as highlighted by Gibbon *et al* in their review of the exposure Draft Crimes Amendment (Provocation) Bill 2013; Gibbon, Steel, Stubbs and Young (n 40) para 3.4.3.

⁷³ The New South Wales Bar Association commenting on 'The Exposure Draft Crimes Amendment (Provocation) Bill 2013' (2013) (Phillip Boulton) <http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_consultation/lpcld_bills.html> (accessed 21 April 2014).

⁷⁴ (No 2) [1999] VR 719

⁷⁵ (1998) 100 A Crim A R 573. See also, *Quartly* (1986) 11 NSWLR 332, 338 and *Lees* [1999] NSWCCA 301 (noting that the words must be 'violent, threatening or otherwise distressing').

defence provided those words were of an exceptional or 'violently provocative' nature. Repudiation of extremely insulting words or gestures from the provocation defence fails to recognise the impact of extreme taunting on domestic violence victims.⁷⁶ Family violence often manifests itself through a variety of non-physical behaviours. This abuse may involve controlling behaviour and emotional abuse, such as, criticising and taunting the victim.⁷⁷ It would be very difficult to establish that this type of conduct had reached the level of a serious indictable offence. In this regard, the notion that ordinary people are only provoked when confronted with a serious indictable offence does not reflect real life. Crofts and Loughnan have suggested that a better approach would be to follow Queensland in excluding words except in the most extreme and exceptional circumstances.⁷⁸

It is also unclear whether it is necessary to establish that V committed the offence alleged. Although unlikely as an intuitive response it remains feasible until settled judicially. If it were necessary to prove the *actus reus* and *mens rea* of the serious indictable offence this would be very difficult to establish given the absence of the alleged perpetrator.⁷⁹ The serious indictable offence requirement is illogical in that it potentially requires the court to consider whether the deceased (V) has committed an offence in circumstances where no offence has been charged. The serious indictable offence mandate shifts the emphasis from the defendant to the victim, by labelling the victim a criminal in circumstances where he is unable to defend himself.⁸⁰

⁷⁶ Gibbon, Steel, Stubbs and Young (n 40) para 3.2. As Tolmie notes, 'it is not uncommon for victims of domestic violence, including victims of severe physical abuse, to observe that the physical abuse is easier to withstand than emotional abuse in such a relationship'; Julie Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] New Zealand Law Review 25, 42.

⁷⁷ Kingsford Legal Centre commenting on the 'Exposure Draft Crimes Amendment (Provocation) Bill 2013' page 1<http://www.lpcld.lawlink.nsw.gov.au/agdbasev7wr/lpcld/documents/pdf/submission_on_edb_kclc_nov_2013.pdf> accessed 23 April 2014. Ibid page 2.

⁷⁸ Crofts and Loughnan, 'Provocation: the Good, the Bad and the Ugly' (n 19). See also, Criminal Code (Qld) section 304(3).

⁷⁹ Gibbon, Steel, Stubbs and Young, (n 40) para 3.4.3.

⁸⁰ Ibid.. See also, Legal Aid NSW, 'The Exposure Draft Crimes Amendment (Provocation) Bill 2013' <http://www.lpcld.lawlink.nsw.gov.au/lpcld/lpcld_consultation/lpcld_bills.html> (accessed 21 April 2014)

Under the previous law, the excessive taunts in scenario (ii) could, when considered in the historical context of the relationship between D and V, amount to provocation.⁸¹ The law reflected the view that it is simply unrealistic to isolate individual incidents of domestic abuse from the oppressive circumstances within which that abuse is situated.⁸² The Court of Appeal, in England and Wales, recognised that it is of practical necessity that in such cases the cumulative impact of the abuse is considered in order to engage in a realistic assessment of whether the partial defence ought to apply.⁸³

Unfortunately, it is unlikely that the defendant in scenario (ii) would be entitled to the revised defence, because of the need to satisfy the serious indictable offence requirement. For instance, it would be difficult to establish that the taunts were said with the intent to cause the victim (D, in the scenario) to fear physical or mental harm for the purposes of section 13 of the Crimes (Personal and Domestic Violence) Act 2007 (NSW). It is well recognised that section 13 (3) is difficult to use in domestic violence cases because of the problems associated with proving that the defendant (V, in the scenario) did, in fact, *intend* to cause the victim to fear harm. The fact that the alleged perpetrator (V) is dead would make this offence more difficult to establish. As a result, the serious indictable offence requirement, combined with the tacit exclusion of extremely insulting words or gestures, potentially excludes non-violent abuse.⁸⁴ The final trigger may be considered trivial and insufficient to amount to extreme provocation, despite the defendant having suffered years of abuse.⁸⁵

Sections 7 and 8 of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) do provide that evidence of past violent conduct is

⁸¹ *R v R* (1981) 28 SASR 32 1 (the provocative trigger of a husband saying they would be 'one happy family' could only be appreciated in the context of the defendant finding out that the victim had been sexually abusing their daughters).

⁸² Rebecca Bradfield, citing Dutton, in 'Understanding the Battered Woman Who Kills her Violent Partner-The Admissibility of Expert Evidence in Domestic Violence in Australia' *Psychiatry, Psychology and Law* (2002) 9(2), 178.

⁸³ *Dawes, Hatter and Bowyer* (n 23).

⁸⁴ Gibbon, Steel, Stubbs and Young, (n 40) para 3

⁸⁵ Legal Aid NSW commenting on the Exposure Draft Crimes Amendment (Provocation) Bill 2013 (n 80). 'The final wrongful act or insult might, of itself, be comparatively trifling, but when taken with what had gone before, might be the last straw in a cumulative series of incidents which finally broke down the accused's self-control and caused him to act in heat of passion'; *Mehmet Ali* (1957) 59 WALR 28, 39.

admissible in relation to the section 13 offence noted above. However, revisiting the history of abuse to identify an earlier serious indictable offence in relation to the partial defence, as envisaged by the New South Wales Parliament, would be problematic.⁸⁶ From an evidential perspective, the defendant in scenario (ii) has confided in her sister rather than an official authority, and according to the New South Wales Domestic Violence Death Review Team it is quite common for abused women to confide in a friend or family member rather than to report the abuse. The result is that there are low levels of indictable offence charges in domestic violence situations.⁸⁷ This would render it difficult for D to provide evidence which may demonstrate that V had previously committed a serious indictable offence against her.

If an allegation of a serious indictable offence constituted sufficient grounds for raising the defence, this might assist victims of unreported long-term domestic abuse.⁸⁸ Of course, if an allegation provided a sufficient base for the partial defence, this potentially provides an avenue for unmeritorious provocation claims, whereby the defendant has manufactured a defence.⁸⁹ For instance, a claim that V had committed assault occasioning actual bodily harm against D (as in scenario (iii)) would be difficult to negate since the only other witness, V, is unable to provide evidence.⁹⁰ The lack of a specific exclusion pertaining to sexual infidelity means that the defence would not be automatically excluded, although it ought to be noted that the existence of such an exclusionary clause would not necessarily bar the availability of the partial defence (see further below).

It could be argued that fact-finders are unlikely to conclude that a slap *per se* could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm. In reality it is the

⁸⁶ Hansard, Legislative Assembly, Second Reading (8 May 2014) 58; Gibbon, Steel, Stubbs and Young, (n 40) para 3.4.2.

⁸⁷ The New South Wales Domestic Violence Death Review Team Annual Report 2011-2012 (n 45).

⁸⁸ Gibbon, Steel, Stubbs and Young, (n 76) para 3.

⁸⁹ The Committee (n 3) para 6.34. Graeme Coss, 'The Exposure Draft Crime Amendment (Provocation) Bill 2013'

<http://www.lpcldr.lawlink.nsw.gov.au/lpcldr/lpcldr_consultation/lpcldr_bills.html> (accessed 21 April 2014).

⁹⁰ Section 59 of the Crimes Act 1900 (NSW) provides that '[w]hosoever assaults any person, and thereby occasions actual bodily harm, shall be liable to imprisonment for five years; Ibid Coss.

sexual infidelity coalesced with the assault that caused the defendant to lose self-control. The trial judge could potentially exclude the infidelity or the defence under his/her general discretion, on grounds that the assault ('a slap') is insufficient to raise the partial defence. It is worthy of note, however, that in some jurisdictions a slap could provide sufficient grounds for such a defence.⁹¹ The New South Wales government rejected the Committee's recommendation to codify the common law principle that a judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.⁹² This mirrored the earlier approach of the Commission, subsequently enacted under section 54(6) of the 2009 Act.⁹³ The New South Wales government was of the view that such an amendment would cause unnecessary confusion on grounds that the trial judge's exclusionary discretion is a principle of general application, which has not been codified in relation to other defences.⁹⁴

The idea that the courts would be required to determine which serious indictable offences are valid for the purposes of the partial defence would arguably be inimical to the government's aim that extreme provocation be determined by reference to a list of defined offences. Parallels may be drawn with the recognised medical condition requirement found within the diminished responsibility defence in England and Wales. The Court of Appeal, in *Dowds*⁹⁵, when considering whether voluntary acute intoxication could form the basis of a diminished responsibility plea, ruled that the presence of a recognised medical condition is a necessary, but not always a sufficient condition to raise the partial defence.⁹⁶ The material effect of the ruling is that jurisprudential authority will be required in order to determine whether a number of recognised medical conditions are capable of satisfying the partial defence. Ultimately, prohibiting the availability of the partial defence in cases where a serious indictable offence is alleged would undoubtedly result in appellate litigation, as has occurred in relation to the diminished responsibility plea in England and Wales.

⁹¹ See, for example, s210(3) MPC, and *State v D'Antuono* 441 A.2d 846, 850 (Conn 1982).

⁹² The Committee (n 3) recommendation 9.

⁹³ Law Com No 290, 2004 (n 3) para 3.150. See also, *Jewell* [2014] EWCA Crim 414 and *Workman* [2014] EWCA Crim 575, which highlight the need for sufficient evidence to leave the partial defence to the jury.

⁹⁴ New South Wales Department of Attorney General and Justice (n 27).

⁹⁵ *Dowds* (n 22)

⁹⁶ *Ibid*

In any event, it is highly artificial to isolate provocative conduct from its context. As previously noted, a mandate restricting juror evaluation to an isolated serious indictable offence could have significant implications for the abused defendant. Assault occasioning actual bodily harm could constitute the final straw that causes the abused defendant to lose control. Again, it is the composite of the assault and the abuse that induce the defendant's response, not the assault *per se*. The abrogation of this important contextual narrative may result in rejection of the partial defence in cases where a defence ought to be available. These illustrations demonstrate that in most cases involving sexual infidelity and/or domestic abuse (whether or not such amounts to a serious indictable offence), the infidelity/abuse will be integral to the facts and to 'compartmentalise sexual infidelity [/certain forms of violence] and exclude it when it is integral to the facts as a whole...is unrealistic and carries the potential for injustice.'⁹⁷ It was on this basis that the Court of Appeal, in *Clinton*⁹⁸, adopted a remarkably inclusionary approach to the application of the explicit sexual infidelity prohibition under section 55(6)(c) of the 2009 Act.⁹⁹ The ruling mandates, in effect, that sexual infidelity may be considered relevant as part of the circumstances in a loss of control claim where it is not the *only* factor to be relied upon for the purposes of establishing a qualifying trigger. The Committee was not persuaded that a New South Wales court would necessarily adopt the view of their Lordships in *Clinton*, who ruled that sexual infidelity could not be removed from its context, and therefore it is, perhaps, unlikely that the New South Wales court would admit contextual evidence when assessing the availability of the partial defence.¹⁰⁰ In this regard, juridical precepts clarifying the parameters of this new nomenclature is urgently required. In the interim period the importation of the 2014 Act remains open to conjecture.

The act of masturbation in scenario (iv) would constitute an act of indecency, carrying a maximum term of two years imprisonment.¹⁰¹ As a result, the victim's conduct does not amount to a serious indictable offence and would not, therefore, provide a basis for the extreme provocation defence. This example illustrates the extent to which the serious indictable

⁹⁷ *Clinton* [2012] EWCA Crim 2; [2013] QB 1 (CA (Crim Div)) 39. See also, Nicola Wake, 'Loss of Control Beyond Sexual Infidelity' (2012) 76(3) 193.

⁹⁸ *Ibid Clinton*.

⁹⁹ Wake (n 97).

¹⁰⁰ The Committee (n 3) para 9.62.

¹⁰¹ Crimes Act 1900 (NSW), s.61N(1).

offence mandate has the potential to preclude the availability of the defence in extremely provocative circumstances. Replacing the child in scenario (iv) with a ten-year-old serves to expose the absurdity of this arbitrary delineation. Section 61O(2) of the Crimes Act 1900 renders it an indictable offence, of up to seven-years imprisonment, to commit an act of indecency towards a person under the age of ten-years. The effect is that the defence would be available the day before the child's eleventh birthday, but not on the day of his birthday, despite the conduct of V being no less provocative.¹⁰² Similar issues arise in relation to the age of criminal responsibility.¹⁰³ If the admissibility of provocative behaviour on the part of a child depends upon the lawfulness of that behaviour, then a child under the age of fourteen is presumed incapable of provocative conduct for the purposes of the defence, whilst a child under the age of ten is deemed incapable of such conduct. Postulation (iv) serves to demonstrate that there will undoubtedly be a series of circumstances where many would agree that the defence ought to be available but no serious indictable offence has occurred.

(d) The Exclusionary Conduct Model

Despite the government's reservations regarding the exclusionary conduct model, the Act specifically excludes the defence where the provocation is self-induced or based upon a non-violent sexual advance. In addition, self-induced intoxication is excluded when assessing whether an ordinary person would have lost self-control.¹⁰⁴

The New South Wales government asserts that it is a matter of common sense for jurors to determine whether particular conduct constitutes a non-violent sexual advance, but the concept remains poorly defined.¹⁰⁵ If this exclusion is to operate at all, it will do so only in limited

¹⁰²Gibbon, Steel, Stubbs and Young, (n 40).

¹⁰³ The age of criminal responsibility in New South Wales is ten; Children (Criminal Proceedings) Act 1987 No 55 (NSW), section 5. The common law presumption of *doli incapax* continues to apply in New South Wales. On the age of criminal responsibility, see generally, Arthur in the following chapter.

¹⁰⁴ Crimes Act 1900 (NSW) section 23(3)(b) (a) and (5), respectively, as amended by the Crimes Amendment (Provocation) Act 2014 (NSW), schedule one.

¹⁰⁵ Hansard, Legislative Council, Second Reading (5th March 2014). The Committee (n 3) para 3.32. Although see Crofts and Loughna, 'Provocation: the Good, the Bad and the Ugly' (n 19) in which they suggest that this problem is 'not insurmountable'.

circumstances as a non-violent sexual advance will rarely amount to a serious indictable offence.¹⁰⁶ In cases where the sexual advance amounts to a serious indictable offence it is questionable why this specific form of conduct has been excluded from forming the basis of the partial defence, when all other serious indictable offences are *prima facie* capable of giving rise to the partial defence. The statutory wording excludes ‘non-violent sexual advances *taken alone*’, which appears to imply that the partial defence may be invoked in a more nuanced and attenuated way where the non-violent sexual advance is combined with other conduct.¹⁰⁷

This is important since a non-violent sexual advance may constitute the last straw for an abused defendant. However, this potentially invites defence counsel to ensure that the provocative conduct falls within the scope of the Act in other (potentially unmeritorious) cases.¹⁰⁸ It may be that a non-violent sexual advance would only be relevant if it were combined with a serious indictable offence. This would align the exclusion with legislation in the ACT and the Northern Territory which state that a non-violent sexual advance cannot, *of itself*, found a defence of provocation, but may be considered in the context of other conduct by the victim.¹⁰⁹ If this is the case, the ostensible exclusion potentially operates to include non-violent sexual advances depending upon the circumstances of the individual case. This is surely inimical to the policy objectives of the New South Wales government and the Committee, and is likely to have unintended consequences in practice.¹¹⁰

Reflecting the common law position, which precludes the availability of the mitigation on the basis of the defendant’s prior fault in instigating

¹⁰⁶ Crofts and Loughnan (n 32). For example, Ierace identifies section 66C(3) and 73(1) and (4) of the Crimes Act 1900 where violence is not an element of the offence; Public Defenders, ‘Crimes (Provocation) Amendment Bill 2013’ http://www.lpcldr.lawlink.nsw.gov.au/agdbasev7wr/lpcldr/documents/pdf/submission_on_edb_pds_nov_2013.pdf (accessed 8 August 2014).

¹⁰⁷ See the comments of the Gay and Lesbian Rights Lobby, ‘Ending an excuse for murder: Revisiting the partial defence of provocation in New South Wales’ (2013) <http://www.lpcldr.lawlink.nsw.gov.au/lpcldr/lpcldr_consultation/lpcldr_bills.html> (accessed 21 April 2014).

¹⁰⁸ Coss (n 89).

¹⁰⁹ Criminal Code Act NT (No 2) (2006), section 158 (5) (as inserted by the Criminal Reform Amendment Act (no 2) (2006) (NT S17)); and, Crimes Act 5 1900 (ACT) 13 (3) (as inserted by the Sexuality Discrimination Legislation Amendment Act 2004 (ACT) section 3 Schedule 2 part 2.1).

¹¹⁰ See, for example, the comments in Hansard, Legislative Council, Second Reading (n 105).

the victim's behaviour, the exclusion of self-induced provocation is relatively unremarkable.¹¹¹ The provision may be aligned with sections 55(6)(a)-(b) of the 2009 Act, which prohibits the availability of the loss of control defence where the provocative conduct was induced by the defendant for the purpose of using it as an excuse to use violence.¹¹²

Parallels may be drawn between the defendant who incites provocative conduct and an individual who drinks alcohol to excess. The exclusionary clause is in line with section 428F of the Crimes Act 1900 which provides that where, for the purposes of determining whether a person is guilty of an offence, it is necessary to compare the state of mind of the accused with that of a reasonable person, the comparison is to be made between the conduct or state of mind of the accused and that of a reasonable person who is not intoxicated:

Provocation...is as available to an intoxicated accused as to a sober accused. If an intoxicated accused has in fact lost his or her self-control, it becomes a question of fact for the jury whether that loss of self-control was caused by the deceased's words or conduct, or solely by the inflammatory drink or drugs.¹¹³

In practice, section 23(5) of the 2014 Act ensures that the jury may no longer take into account self-induced intoxication.¹¹⁴ A similar approach was adopted at common law in relation to the loss of control defence in England and Wales. In *Asmelash*¹¹⁵, the Court of Appeal assessed whether the voluntary consumption of alcohol could fall within the defendant's circumstances for the purposes of the partial defence. Prior to *Asmelash*, it was thought that the defendant's circumstances might include the consumption of alcohol. The Supplement to the Crown Court Bench Book (2011) stated that:

¹¹¹ As Robinson notes, 'every jurisdiction...acknowledges that causing-one's own defense can be relevant to an actor's liability'; Paul H Robinson, 'Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine' 71 Virginia Law Review 1, 24 (1985).

¹¹² See generally, *Dawes, Hatter and Bowyer* (n 23) where the court established that just because the defendant is behaving badly and acting in a provocative manner does not necessarily mean that the defence will be precluded.

¹¹³ *Cooke* (1985) 16 A Crim R 304.

¹¹⁴ Hansard, Legislative Council, Second Reading (n 105).

¹¹⁵ *Asmelash* (n 59).

[T]he jury will no longer be directed that a reasonable man is a sober man. The jury will need to decide whether a man in these circumstances (including the consumption of drink) but nevertheless possessing a normal degree of tolerance and self-restraint might act as D did.¹¹⁶

The Lord Chief Justice cited with approval the initial trial judge's direction to ignore the defendant's intoxication and apply *Majewski*¹¹⁷ standardisations; namely that intoxication is never a defence, save in the context of specific intent offences and operatively as a denial of the requisite *mens rea*. The effect is that evidence of voluntary intoxication does not preclude the availability of the partial defence, rather the defendant's conduct is considered according to the standards of the ordinary sober person. The *Asmelash* litigation might have been avoided had Parliament enacted a specific exclusionary clause akin to that in the 2014 Act. The Commission recently acknowledged that the lack of an explicit exclusionary clause pertaining to acute intoxication had presented problems in relation to the partial defences.¹¹⁸

The new extreme provocation defence is heavily circumscribed. The loss of control limb of the defence has always made it difficult for the abused defendant to claim the partial defence, and it is clear that combining this requirement with the need to establish a serious indictable offence on the part of the victim will only serve to make it more difficult for the abused killer to satisfy the new plea. The scenarios outlined in this part of the chapter demonstrate the potentially arbitrary nature of the

¹¹⁶ Cited in *Ibid.*, [20]. Ormerod similarly identified that the partial defence 'only appears to exclude a circumstance on which D seeks to rely if its *sole* relevance is to diminish D's self-restraint. This could open the opportunity for D to adduce all sorts of evidence. In particular, D might claim that his intake of alcohol or other intoxicants was a relevant circumstance.' David Ormerod, *Smith and Hogan's Criminal Law* (Oxford University press: Oxford 2011) 526.

¹¹⁷ [1976] UKHL 2, [1977] AC 443. Andrew Simester, 'Intoxication is Never a Defence' [2009] Crim LR 3, 5. See, generally, Alan Reed and Nicola Wake, 'Potentiate Liability and Preventing Fault Attribution: The "Intoxicated Offender" and Anglo-American *Depeçage* Standardisations' (2014) John Marshall Law Review, Chicago 47, 57
<<http://repository.jmls.edu/cgi/viewcontent.cgi?article=1702&context=lawreview>> (accessed 10 June 2014)

¹¹⁸ Consequently, the Commission's newly proposed affirmative 'recognised medical condition' defence contains a specific exclusion preventing voluntary acute intoxication from satisfying the defence; Law Commission of England and Wales, *Insanity, Automatism and Intoxication* (Law Com DP, 2013).

defence, and suggest that the defence may be precluded in cases where it really ought to be available. Abused killers in NSW may now find themselves in the same position as if the defence had been abolished, since the practical effect of the revised plea is that it is now more likely that she will be convicted of murder and sentenced accordingly.

III. Provocation in Sentencing: The New Zealand Experience

This part of the chapter considers the impact that the absence of an adequate partial defence has on the abused killer, via a review of the position in New Zealand where the defence has been abolished. For a significant number of commentators the arguments in favour of abolishing the partial defence are undeniable. Indeed the partial defence has been abolished in Tasmania, Victoria (considered below) and Western Australia.¹¹⁹ The defence has been heavily criticised for being gender biased, out-of-date, and fundamentally flawed.¹²⁰ As previously noted, several inquiry participants suggested that provocation could be adequately dealt with at the sentencing stage. At this point, it is worth reiterating that, in New South Wales, both self-defence and excessive self-defence in their current formulations are simply unable to adequately respond to defendants who kill after prolonged abuse and whom currently rely on provocation.

The argument that provocation should be dealt with as a sentencing matter in New South Wales carries more force than it does in England and Wales where the mandatory life sentence is still in operation.¹²¹ The importance of fair labelling, and the affect that a jury verdict has on sentencing, remain equally important considerations across both jurisdictions. For some, a provoked killing remains an intentional killing, and therefore worthy of the murder label.¹²² Provoked killings can often be

¹¹⁹ See, The Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas); Crimes (Homicide) Act 2005 (Vic); Western Australia provision

¹²⁰ See, for example, the comments by Coss (n 89); Jeremy Horder, *Provocation and Responsibility* (1992) 186-187; and Nourse (n 53) 1341.

¹²¹ Law Com No 290, 2004 (n 5) paras 5.10-5.11. See, in the context of diminished responsibility, Howard herein at chapter 12. Crimes Act 1900 (NSW), section 19A provides that the *maximum* sentence for murder is life imprisonment. It should be noted, however, that in limited cases the mandatory life sentence continues to apply; section 19B.

¹²² Coss (n 89).

equally as brutal some of the worst murders, but some may be far less culpable, and it is these cases that ought to be recognised as manslaughter:

If we abolish the defense, what becomes of the woman who, distraught and enraged, kills her stalker, her rapist, or her batterer? I suspect that many would say that these women deserve our compassion.¹²³

It is appropriate that jurors to determine whether the killing is more-or-less blameworthy depending upon the circumstances of the case. This ensures transparency in approach, engages society in the decision-making process and thereby increases societal confidence in the criminal justice system.¹²⁴

The cases of *Ambach*¹²⁵ and *Weatherston*¹²⁶ provided an excuse to repeal the partial defence in New Zealand. Ambach ruthlessly beat 69 year-old Ronald Brown around the head with a banjo before ramming the broken neck of the instrument down the victim's throat. Ambach ransacked the victim's home, overturning furniture, smashing windows and ripping fittings from the walls. Ambach had thrown so many items on to the stairs where Mr Brown lay that the stairs were almost impassible. The stair area was heavily spattered with blood and smears of the victim's faeces were found downstairs.¹²⁷ Despite the horrific nature of the attack,

¹²³ Nourse (n 53) 1390 [footnote omitted from original quote]. The Committee (n 3) para 5.4. See, generally, Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 65. See generally, Martin Wasik, 'Partial Excuses in Criminal Law' (1982) 45(5) *Modern Law Review* 516. As Crofts and Loughnan note, 'part of the role of provocation is to reduce (but not erase) the stigma and condemnation attached to offender's behaviour by convicting of the offence of manslaughter rather than murder'; Crofts and Loughnan, 'Provocation: the Good, the Bad and the Ugly' (n 19). See generally, Thomas Crofts, 'Two Degrees of Murder: Homicide Law Reform in England and Western Australia' (2008) 8 *Oxford University Commonwealth Law Journal* 187-210.

¹²⁴ Ibid Crofts and Loughnan, 'Provocation: the Good, the Bad and the Ugly'

¹²⁵ *Ambach* HC Auckland CRI-2007-004-027374, 18 September 2009. See, generally, Andrew Koubaridis, 'Jury find banjo killer guilty of manslaughter' (2009) *The New Zealand Herald*

<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10582997>

(accessed 21 April 2014) and Andrew Koubaridis, 'Accused blames spiked drink for rage' (2009) *The New Zealand Herald*

<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10581699> (accessed 21 April 2014).

¹²⁶ *Clayton Robert Weatherston* [2011] NZCA 276,

¹²⁷ *Ambach* (n 232) [3]-[4].

Ambach successfully pleaded provocation on grounds that the victim had made minor sexual advances towards him. The trial judge imposed a 12-year-sentence with a minimum non-parole period of only 8 years, despite describing the killing as being 'as close to murder as you could possibly get while still obtaining the benefit of manslaughter', and asserting that 'the degree of provocation was extremely low and was aggravated by the use of weapons'.¹²⁸

It was the latter case of *Weatherston*,¹²⁹ which generated most media attention. Clayton Weatherston, a 33-year-old lecturer from Otago University, savagely stabbed his ex-girlfriend and former student in a locked bedroom at her parents' home, while her mother desperately tried to get into the room. Weatherston was unsuccessful in his provocation claim, but his protracted television testimony in which he asserted that he had killed the victim because of 'the emotional trauma she [had] caused [him]' resulted in public outrage and was branded a 'national disgrace'.¹³⁰

On 24 November 2009, the House of Representatives voted 116:5 in favour of the Crimes (Provocation Repeal) Amendment Bill 2009, with the effect of transferring issues pertaining to provocative conduct to the sentencing judge. The lack of a formal diminished responsibility defence, and New Zealand's rejection of excessive self-defence claims, coalesced with the abolition of provocation, effectively means that New Zealand has no partial defences capable of reducing murder to manslaughter. Culpable homicides are treated as murder and defendants are sentenced accordingly.¹³¹

The experience in New Zealand, post abolition of the partial defence, is that transplanting provocation issues from the trial to the sentencing stage in murder cases is both punitive and ineffective. The Crimes (Provocation Amendment) Repeal Act 2009 (NZ) has resulted in some defendants

¹²⁸ NZ Herald Staff, NZPA, NEWSTALK ZB 'Banjo killer sentenced to 12 years in jail' (2009) *The New Zealand Herald* <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10598104> (accessed 21 April 2014).

¹²⁹ *Weatherston* (n 233).

¹³⁰ Ibid 2; Jarrod Booker 'Jury finds Weatherston guilty of murder' *The New Zealand Herald* (2009) available at: <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10585763> (accessed 21 April 2014).

¹³¹ Warren Brookbanks, 'Partial Defences to Murder in New Zealand' in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2011) 271; Hamidzadeh [2012] NZCA 550 (28 November 2012) [7].

(including battered women defendants) receiving harsher penalties including murder convictions and longer prison terms.¹³² Many of the issues raised in provocation trials have simply been shifted to the sentencing stage. In an unnerving precedent, the sentences being issued in cases involving domestic abuse victims who kill their abusers are more than double the thresholds that were issued pre-abolition of the provocation defence.¹³³ As a result, a number of ‘women are languishing in New Zealand jails...for unjustifiably killing their partners’ despite the fact that ‘the broader community would understand that they did so as a result of appalling violence and intolerable conditions.’¹³⁴

The Supreme Court recently refused Jacqueline Wihongi’s application for leave to appeal the Court of Appeal’s ruling that her eight-year term of imprisonment be increased to 12-years.¹³⁵ The initial trial judge’s decision to issue an eight-year sentence marks one of very few rulings in which the presumption of life for murder has been displaced since the Sentencing Act 2002 (NZ) came into force.¹³⁶ There is a presumption under section 102 that a sentence of life imprisonment will be imposed where the defendant is convicted of murder.¹³⁷ If a life sentence is imposed, the defendant must serve a minimum of 10 years (or 17 years, if the murder was aggravated)¹³⁸, unless that sentence would be ‘manifestly unjust’.¹³⁹

¹³² See, for example, *Wihongi* [2012] NZSC 12.

¹³³ Equal Justice Project, ‘Battering the Law’ (2013)

<<http://equaljusticeproject.co.nz/2013/09/12/battering-the-law/>> (accessed 21 April 2014).

¹³⁴ This point was raised by Mr David Shoebridge during discussion on the new extreme provocation defence in NSW; Legislative Council, Second Reading (n 198) page 27417 Mr David Shoebridge.

¹³⁵ *Wihongi* (n 132)

¹³⁶ In *Law* (2002) 19 CRNZ 500, the mercy killing of an elderly woman suffering from Alzheimer’s Disease by her husband, attracted an 18 month term of imprisonment. See also, *Reid* HC Auckland CRI-2008-090-2203, 4 February 2011. It is worth noting that the Court of Appeal upheld the High Court ruling that a sentence of life imprisonment would be manifestly unjust; *Wihongi* (n 132) [2].

¹³⁷ Sentencing Act 2002 (NZ), section 102.

¹³⁸ *Ibid* section 104. In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case: (a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon; (b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place; (c) that the offence was committed while the offender was still on bail or still subject to a sentence; (d) the extent of any loss, damage, or harm resulting from the offence; (e) particular

In the majority of cases, it is highly unlikely that a finding of manifest injustice will be made. In appropriate cases, however, provocation may be considered in determining whether it would be manifestly unjust to impose a sentence of at least 17 years imprisonment. The Court of Appeal advised that this type of case will be 'exceptional but need not be rare.'¹⁴⁰

Despite the restrictive legislative regime operating in New Zealand, the legislature failed to issue any specific guidance as to how provocative conduct might be considered during the sentencing stage of trial.¹⁴¹ The New Zealand Law Commission considered that any modification to the 'manifestly unjust' test 'may undermine the message that life imprisonment remains the norm in cases of intentional killing'.¹⁴² The trial judge is charged to determine whether the degree of provocation is so 'extreme' that it would be justifiable for a sentence of less than life imprisonment to be imposed.¹⁴³ The court is required to assess whether the provocative words or conduct should be treated in all the circumstances as reducing the culpability of the defendant. In this regard, any provocative words or conduct by the victim may be treated as a mitigating factor.¹⁴⁴

cruelty in the commission of the offence; (f) that the offender was abusing a position of trust or authority in relation to the victim; (g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender; (f) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age or disability; and (i) the hostility is because of the common characteristic; and (ii) the offender believed that the victim has that characteristics; (ha) that the offence was committed as part or, or involves a terrorist act (as defined in s. 5(1) of the Terrorism Suppression Act 2002); (i) premeditation on the part of the offender and, if so, the level of premeditation involved; (j) the number, seriousness, date, relevance, and nature of any previous convictions for which the offender is being sentenced or otherwise dealt with at the same time; Sentencing Act 2002m (NZ) s.9(1)).

¹³⁹ Ibid section 102. See generally, *O'Brien* (2003) 20 CRNZ 572 [36]; and, *Mayes* CA26/03 16 October 2003 [32].

¹⁴⁰ For example, 'cases such as mercy killings, failed suicide pacts and situations in which the accused is termed a "battered defendant"'; *Hamidzadeh* (n 131) [57] See also, *Rapira* [2003] 3 NZLR 794 [120]-[121]; and *Williams* [2005] 2 NZLR 506 (CA).

¹⁴¹ Ibid *Hamidzadeh* [1].

¹⁴² New Zealand Law Commission, *The Partial Defence of Provocation* (NZLC R98, 2007) 200.

¹⁴³ *Hamidzadeh* (n 131) [48].

¹⁴⁴ Ibid [53]-[54].

The Court of Appeal, in *Hamidzadeh*¹⁴⁵, expressed that it would be inappropriate to return to ‘the legal gymnastics’ required in assessing the provocation defence, but did provide further guidance for judges, *vis-à-vis* the articulation of provocation as a mitigating factor in terms of appropriate specimen guidance for future sentencing. In determining whether the defendant’s culpability is reduced, Justice Randerson pronounced a non-exhaustive list of five factors which the sentencing judge should take into account, including:

- (a) the nature, duration and gravity of the alleged provocation;
- (b) the timing of any response by the defendant;
- (c) whether the response was proportionate to the nature, duration and gravity of the provocation;
- (d) whether the provocation was (or remained) an operative cause of the defendant’s response; and,
- (e) whether the provocation was such as to reduce the defendant’s culpability in all the circumstances.¹⁴⁶

It is no longer necessary to determine whether the provocation would have deprived the ordinary person, with the characteristics of the defendant, of the power of self-control. A killing in response to a sudden and justified loss of self-control, however, may indicate a lower degree of culpability than one involving a controlled and calculated response.¹⁴⁷ In terms of sexual infidelity, the court acknowledged Lord Judge’s ruling in *Clinton*¹⁴⁸ that such situations can give rise to highly emotional responses, but concluded that the ‘ordinary expectation of the community is that this ought not to justify the use of violence, especially where there are fatal consequences’.¹⁴⁹

The High Court considered that Wihongi’s case was ‘exceptional’ with significant mitigating factors. Wihongi stabbed her estranged partner, Mr Hirini, following an argument over him taking several thousand dollars in compensation she had received, during the course of which he demanded

¹⁴⁵ Ibid [60]-[64].

¹⁴⁶ Ibid [71].

¹⁴⁷ Ibid [60]. See also, *Brookbanks* (n 131) 271; *Tyne v Tasmania* [2005] TASSC 119, (2005) 15 Tas R 221.

¹⁴⁸ *Clinton* (n 97) [16].

¹⁴⁹ *Hamidzadeh* (n 131) [64] and [68]. See also, *Felicité* [2011] VSCA 274.

sexual intercourse.¹⁵⁰ Before issuing the eight-year sentence, Justice Wild of the High Court described Wihongi's 'history of victimhood'.¹⁵¹ At the age of 13, Wihongi suffered an anoxic brain injury following a drugs overdose in response to an argument with her mother. Upon leaving hospital, she was unable to walk or speak properly and when she eventually returned to school she lasted less than one month before leaving and never going back. From that point, Wihongi had consistently abused alcohol and, at the age of 14, was sexually abused by her drug and alcohol counsellor. Shortly thereafter, Wihongi began a relationship with Mr Hirini's older brother who prostituted her for money and drugs over a six-month period. At the age of 16, she commenced a 'tempestuous and chaotic' relationship with Mr Hirini, a 'Black Power' gang member. The relationship was marked by alcohol abuse and domestic violence and Wihongi was gang-raped many times by members of the 'Black Power' gang. At the age of 19, a member of the gang threatened to harm Wihongi's baby daughter before raping her in her own home. When she was 26, an intruder broke into her home and hit her over the head with a full bottle of beer in front of her children. Justice Wild was of the opinion that Hirini's demand for sexual intercourse triggered Wihongi's loss of self-control. He considered that Wihongi's violent response may have been the product of 'an overwhelming sense of anger, threat and fear driven by a combination of cognitive impairment, the effects of repeated trauma, personality dysfunction and the chaotic and conflicted relationship she had with the victim'.¹⁵² A sentence of eight-years imprisonment was imposed on grounds that life imprisonment would be 'manifestly unjust'.¹⁵³

Women's Refuge extolled the sentence of the High Court as 'brave and right', but the Court of Appeal subsequently substituted the eight-year prison term with a sentence of 12-years on grounds that Wihongi represented a 'high risk of reoffending' due to her association with the gang.¹⁵⁴ In a ruling that showed an appalling lack of understanding of the

¹⁵⁰ *Wihongi* HC Napier CRI 2009-041-2096 [2010] NZHC 2034 (30 August 2010) [6]-[8].

¹⁵¹ *Ibid* [25].

¹⁵² *Ibid* [38].

¹⁵³ *Ibid* [46].

¹⁵⁴ See, Dan Satherley, 'Woman receives only eight years for murder' 3 News <<http://www.3news.co.nz/Woman-receives-only-eight-years-for-murder/tabid/423/articleID/173403/Default.aspx>> (accessed 22 April 2014); *Wihongi* (n 132) [2]; Equal Justice Project (n 133).

sexual abuse, substance abuse and other mental impairments from which Wihongi suffered, the Court of Appeal claimed that they would only reduce her sentence if she discontinued 'any association with gangs' asserting that 'given their treatment of her, there is every incentive for her to do so'.¹⁵⁵ Dissociation from a gang is often very difficult. The gang members may demand money or force the leaving member to commit a crime. In other cases the member will be required 'to undergo some formal punishment' before being allowed to leave the gang. This may involve a beating from other gang members, serious assault and in some cases stabbing.¹⁵⁶ The Supreme Court denied Wihongi's appeal against sentence.¹⁵⁷

The *Wihongi* litigation illustrates a worrying lack of understanding of the circumstances of domestic and familial abuse. In New Zealand, the abrogation of the provocation defence has the effect of circumventing the moral evaluation as to whether the defendant ought to be convicted of murder or manslaughter. The moral evaluation undertaken by jurors in such cases provides an important backdrop against which the sentencing judge can determine the appropriate sentence, in light of applicable sentencing guidelines.¹⁵⁸ Irrespective of whether a mandatory life sentence exists, as in England and Wales (with or without the potential for reduction in 'exceptional circumstances', as in New Zealand) or not, as in New South Wales, there will undoubtedly be cases in which the murder label is inappropriate. It is inherently unjust to label the abused defendant who kills in despair and out of self-preservation a murderer. This injustice is further exacerbated by the fact that individuals who are convicted of murder are more likely to receive a longer term of imprisonment than those convicted of manslaughter. Unfortunately, the restrictive ambit of the 2014 Act is likely to place abused defendants in this position, despite the ostensible availability of a partial defence.

¹⁵⁵ *Ibid.*, Equal Justice Project.

¹⁵⁶ Rebecca Kesby, 'New Zealand gangs: The Mongrel Mob and other urban outlaws' (2012) BBC News available at: <<http://m.bbc.co.uk/news/magazine-19153425>> (accessed on 22 April 2014).

¹⁵⁷ *Wihongi* (n 132).

¹⁵⁸ On the importance of fair labelling see, George P Fletcher, *Rethinking Criminal Law* (1978), 4.2.1, 243. See also, Paul H Robinson, *The Fundamentals of Criminal Law* (1988) 619. See also, James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217.

IV. Context is Essential: Learning from the Experience in Victoria

One thing that is certain from the foregoing analysis is that context is essential in cases involving domestic abuse. This was made clear by the Committee, it is evident from the cases of *Thornton*, *Hickey*, and *Hirini* in England and Wales, New South Wales and New Zealand respectively, and the recent reforms to law relating to self-defence and the admissibility of evidence on family violence in Victoria makes this explicit.¹⁵⁹ This part of the chapter suggests that the NSW government erred in refusing to enact a specific social framework provision when reformulating the provocation defence, and argues that experience in Victoria indicates that the criminal justice systems of England and Wales, New South Wales and New Zealand could each benefit from the introduction of a specific social framework provision and education package, which is individually tailored to suit the disparate approaches to provocative conduct within each of these jurisdictions.

The provocation defence was abolished in Victoria and replaced by a new offence of defensive homicide in 2005, which was complemented by a provision which outlined the circumstances in which family violence might be admissible in homicide cases.¹⁶⁰ The offence of defensive homicide was designed to operate in cases where the defendant kills in circumstances in which self-defence applies, but the defendant did not have reasonable grounds for the belief that force was necessary.¹⁶¹ This engaged a two-part test where jurors were required to consider whether the defendant believed their conduct was necessary in order to defend him/herself or another person from death or really serious injury. If jurors were satisfied that the defendant held that belief, or alternatively, the prosecution failed to disprove beyond reasonable doubt that the defendant held that belief, then the defendant had to be acquitted of murder and jurors were directed to consider whether he/she was liable for defensive homicide. The defendant would be guilty of defensive homicide if the

¹⁵⁹ See generally, Victoria Department of Justice, 'Defensive Homicide Proposals for Legislative Reform' (DoJ CP, 2013).

¹⁶⁰ Crimes (Homicide) Act 2005 (Vic); Crimes Act 1958 (Vic) sections 9AD and 9AH, respectively.

¹⁶¹ Crimes Act 1958 (Vic), sections 9AC-9AD. See generally, Julia Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] New Zealand Law Review 25.

prosecution established beyond reasonable doubt that the defendant did not have reasonable grounds for the belief.¹⁶²

In such cases, evidence of family violence could be admitted under s9AH of the Crimes Act 1958 (Vic) in order to help jurors to understand the circumstances of the defendant. Evidence of family violence includes, *inter alia*, the history of the relationship between the defendant and the family member, including violence towards the defendant or another family member; the cumulative effect of that violence on the defendant and/or another family member; and, the social, cultural and economic factors that impact a person or family member who has been affected by family violence. How these factors affect people and relationships generally might also be relevant.

The offence of defensive homicide was heavily criticised for its complexity by practitioners and academics alike.¹⁶³ The VLRC noted that there was a lack of evidence in respect of whether the offence was adequate in cases where women kill in response to family violence, particularly given that 25 out of the 28 defensive homicide convictions were of men.¹⁶⁴ The defence was also used to advance provocation-type arguments, although it has been recognised that comparatively defensive homicide has been utilised in fewer cases to partially excuse male on female intimate partner violence than the provocation defence.¹⁶⁵ It was also suggested that by removing the focal enquiry from self-defence to defensive homicide, the offence tacitly implied that the abused woman's response was irrational, rather than reasonable in the circumstances.¹⁶⁶ It is therefore unsurprising that defensive homicide was abolished following comprehensive review.¹⁶⁷ Abolition of the offence emphasised the need to

¹⁶² *Babic* (2010) 28 VR 297 [95].

¹⁶³ See, for example, Justice Mark Weinberg, 'The Criminal Law-A "Mildly Vituperative" Critique' (2012) 35 Melbourne University Law Review 1177, 1182; Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2012) 52 British Journal of Criminology 158, 167-168.

¹⁶⁴ The Victoria DoJ CP, 2013 (n 159) notes that since 2010, there have been three defensive homicide convictions in cases where women have killed their intimate partner. These cases are: *Black* [2011] VSC 152; *Creamer* [2011] VSC 196; and *Edwards* [2012] VSC 138.

¹⁶⁵ *Ibid* Victoria DoJ CP, 2013, 27-28. See also *Middendorp* (2010) VSC 202.

¹⁶⁶ *Ibid* Victoria DoJ CP, 2013, viii.

¹⁶⁷ Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (no 63 of 2014) (Vic), section 3.

improve the law on self-defence and evidence admissibility, particularly where alleged family violence is at issue.¹⁶⁸

The Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) subsequently abolished the common law on self-defence and replaced it with a new statutory framework, which outlines the potential impact that evidence of family violence might have in relation to such claims. New section 322K of the Crimes Act 1958 (Vic) requires that the defendant believed that conduct was necessary in self-defence, and the conduct must be reasonable in the circumstances as the defendant perceived them to be. In cases involving murder, it is essential that the defendant believed that the conduct was necessary in order to defend him/herself or another person from the infliction of death or really serious injury. Section 322M specifies that in cases where family violence is an issue, the requirements of self-defence may still be satisfied, even where the threat is not imminent, or the use of force is excessive. The defendant's response may appear excessive in the face of the victim's conduct (see, for example, the 'excessive taunting' scenario outlined above), but it 'is that these acts take place within a context which gives them a *certain meaning*—that the context plus its meaning generate claims of plausible emotion'.¹⁶⁹ Evidence of family violence will undoubtedly be relevant in determining whether self-defence ought to apply in such circumstances. In all cases, the defence does not apply where the defendant is responding to lawful conduct, and the defendant knows that the conduct is lawful at the time.¹⁷⁰ Like the serious indictable offence requirement under the 2014 Act, this element of the defence may render it difficult for the abused defendant to claim the defence where the conduct of the victim may be regarded as trivial, for example, a taunt. How delimiting this will be is likely to depend upon how broadly the court is prepared to interpret section 322M, and the extent to which earlier events may be taken into account.

Prior to the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic) the use of family violence evidence under s9AH was limited to homicide cases. New section 322J extended the use of family violence evidence to all claims of self-defence. It is anticipated that these reforms will help the legal profession and the courts to become more familiar with the law relating to the admissibility of family violence

¹⁶⁸ Victoria DoJ CP, 2013 (n 159), 35.

¹⁶⁹ Nourse (n 53) 1378.

¹⁷⁰ Crimes Act 1958 (Vic), section 322L.

evidence, in addition to increasing understanding of the type of evidence that may be relevant in family violence cases

The offence of defensive homicide may not have had the intended results in Victoria but recognition that the contextual narrative is fundamental in cases involving family violence renders Victoria a step ahead of England and Wales, New South Wales, and New Zealand in this type of case. The use of ‘Social Framework’ evidence is not without its difficulties. Unfortunately, a potential effect of the provision of expert testimony is that it may operate to recast the defendant as weak or psychologically unstable. As a result, her conduct might be framed as irrational as opposed to being comprehensible given the situation. It has been suggested that the admission of psychiatric evidence may result in a more sympathetic approach to the defendant, despite the nature of the defendant’s claims.¹⁷¹ For this reason it is essential that any family violence or social framework provision is appropriately supported by a comprehensive education and training package, designed to assist judges, the legal profession and experts in understanding and dealing with domestic violence cases. There is still some way to go in appropriately accommodating the circumstances of the abused defendant within the criminal justice system (and it is simply not possible to provide a detailed analysis of the implications of Victoria’s new self-defence framework in this chapter) but it is apparent that the introduction of a new individually tailored social framework evidence provision and education package, as recommended by the NSW Committee would go some way in recognising the circumstances of the abused killer in England and Wales, New South Wales, and New Zealand.¹⁷² As Reed identifies in chapter seven, ‘the focal inquiry has concentrated too much on the control element for exculpating, and not enough on the narrative.’¹⁷³

Conclusion

There is an ostensible lack of understanding of the circumstances of abused women who kill their abusers in the law of England and Wales, New South Wales and New Zealand. This lack of understanding manifests itself in various ways in the law pertaining to provocative conduct on the part of the victim within these jurisdictions. The experience in New

¹⁷¹ Nourse (n 53) 1358.

¹⁷² The Committee (n 3) paras 8.102-8.138

¹⁷³ For further discussion see Reed herein at chapter seven.

Zealand demonstrates that in the absence of an applicable defence, abused women are being convicted of murder and sentenced accordingly, despite such killings taking place in circumstances in which many would agree that a manslaughter conviction would be more appropriate. The availability of the partial defence in England and Wales and New South Wales does not automatically mean that such defendants will be spared a murder conviction and receive a reduced sentence. Rather, it suggests that the abused killer may have her case considered before a jury, depending upon the circumstances. Unfortunately the emphasis on the loss of control and serious indictable offence requirements under the 2009 and 2014 Acts, respectively, potentially render it difficult for the abused defendant to successfully claim the partial defence.

The problems with the law in this area are not easy to resolve, but all three jurisdictions would undoubtedly benefit from bespoke family violence provisions tailored to meet the very different needs of these criminal justice systems. Victoria has already trialled s9AH of the Crimes Act 1958 (Vic) in homicide cases, and despite the failure of Victoria's defensive homicide offence the benefits of the family violence provision have been recognised. Victoria's new approach to self-defence places the circumstances of the abused defendant at the centre of analysis where domestic violence is alleged, and as a result of section 322j such evidence is no longer limited to homicide offences only.

The New South Wales Committee similarly recognised the benefits associated with s9AH of the Crimes Act 1958 (Vic), but unfortunately the government was not convinced, and opted not to enact a social framework provision modelled on Victoria's statute. The fact that Victoria's confirmation of the benefits of such evidence occurred in the wake of the introduction of extreme provocation in New South Wales does not detract from the government's disappointing dismissal of this particular Committee recommendation. It is clear that there is a lack of understanding in relation to those who kill their abusers, and appropriate education and training is essential in order to better equip the criminal justice system in dealing with cases of this nature. More importantly, evidence of family violence should be admitted in appropriate trials and/or at the sentencing stage so that those making the decisions in this type of case have at least heard the impact that domestic abuse may have had in relation to the defendant's conduct. As the Victorian Law Reform Commission stated:

Defences and/or partial defences to homicide should not be based on abstract philosophical principles, but should reflect the *context* in which homicides typically occur. In particular, the law should deal fairly with both men and women who kill and defences should be constructed in a

way that takes account of the fact that they tend to kill in different circumstances.¹⁷⁴

¹⁷⁴ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (VLRC, 2004) 15 [author's emphasis added].

Conclusion

These publications demonstrate the inadequacy of exclusionary and positive-restriction-based reform models. Reform's aim is focused upon preventing the availability of the partial defence in unmeritorious cases, at the expense of considering the impact those exclusions/restrictions have upon vulnerable offenders. The sexual infidelity exclusion, which forms part of the loss of control defence in E&W, provides such an example. As noted in (v), the sexual infidelity exclusion may represent the 'final straw' for the primary victim. The sexual infidelity may form an integral aspect of the narrative, which induced the primary victim's loss of self-control. To exclude this important factor from juror evaluation when determining whether the primary victim lost self-control, runs the risk that the partial defence could be rejected, thereby resulting in a murder conviction. In rare cases, sexual infidelity may even form part of the family abuse.¹⁶⁰ In these cases, it is inapposite and unjust to prevent jurors from assessing the impact of sexual infidelity in determining whether the partial defence ought to apply.

The publications reject exclusionary-based clauses focused upon the victim's behaviour. Put simply, the victim's behaviour is beyond the control of the offender, and particular categories of conduct may manifest in a variety of forms. Blanket exclusions on the availability of the partial defence (based upon the conduct of the victim) are apt to cause injustice and have no place in the partial defence. In cases where the victim's conduct is trivial or slight, the higher threshold of the qualifying triggers will preclude the defence.¹⁶¹ In all cases, the trial judge may use his/her exclusionary discretion to filter out unmeritorious cases.

The positive restriction model similarly has the potential to exclude meritorious cases from the parameters of the partial defence. The serious indictable offence requirement demonstrates a total lack of understanding of the nature of family abuse. Brooks explains, it 'is repeated violence of a relational nature'; it is prolonged, continued and systematic abuse, which induces a perpetual state of fear in the primary victim, and not a one-off serious indictable offence.¹⁶² The extreme provocation defence is yet to be test-

¹⁶⁰ Considered in (ix).

¹⁶¹ *Clinton* (n 29).

¹⁶² For an excellent exposition of the relational nature of family violence, see Brooks (n 14).

ed at appellate court level, but it is apparent the new plea will render it difficult for the primary victim to claim the partial defence. The risk is that this vulnerable category of offender would be left bereft of an appropriate (partial) defence. This is the position in NZ, where the Law Commission are reviewing whether a new partial defence ought to be introduced post abolition of the provocation defence in 2009.¹⁶³

These publications identify a common theme across the jurisdictions considered; namely, a lack of understanding regarding the nature of family abuse and its impact on the primary victim. To address this endemic problem, the introduction of social framework clauses modelled on the law in Victoria, and tailored to the law within these jurisdictions is recommended. The proposals advanced are designed as an interim measure that may be enacted to assist in improving current understanding of the impact of family abuse on primary victims. It is envisaged that this optimal reform would complement the partial defence models outlined in Part Four.

¹⁶³ Crimes (Provocation Repeal) Amendment Bill 2009 (NZ).

Part Four : *Self-Defence and Partial Defences in Cases Involving Family Violence and/or Physical Attack*

(viii) 'Battered women, startled householders and psychological self-defence: Anglo-Australian Perspectives'¹⁶⁴

(ix) “‘His home is his castle. And mine is a cage’: A New Partial Defence for Primary Victims Who Kill”¹⁶⁵

Introduction

Part Four builds upon the analysis of the exclusionary and positive-restriction-based reform models considered in Part Three, in addition to exploring the inconsistencies between affirmative self-defence and partial defence formulations. The expansion of the analysis in Part Four to encompass self-defence draws upon another category of vulnerable offender (those subject to attack), and highlights the inconsistencies between the defences available for primary victims. As noted in Part Two, it is important to adopt a holistic approach in relation to defences of this nature to ensure a coherent and workable reform model is advanced.¹⁶⁶ Potential reform options should consider the different models available, and how these models align with other available defences. In this regard, the partial defence reform options advanced in Part Four provide an optimal solution to reform based upon the research underpinning Part Three and the publications which follow.

Publication (viii) compares the fear trigger under the loss of control defence and self-defence formulations in E&W. Section 76 (5A) of the Criminal Justice and Immigration Act 2008¹⁶⁷ provides, ‘in a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances’. In contrast, section 76(6) provides

¹⁶⁴ (n 85), 433-457.

¹⁶⁵ (n 86) 151-77.

¹⁶⁶ See, generally, Claire Hogg, ‘The insanity defence: an argument for abolition’ (2015) *Journal of Criminal Law* 79(4) 250-256.

¹⁶⁷ As inserted by section 43(1)(5) of the Crime and Courts Act 2013.

that in a case other than a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.’ Accordingly, grossly disproportionate force will always be unreasonable, but disproportionate force *may* be reasonable in the overarching context *in householder cases only*.¹⁶⁸ This potentially renders it easier for householders to claim self-defence against a trespasser than it is for primary victims to claim self-defence against a predominant aggressor.¹⁶⁹ The purpose is to provide a ‘discretionary area for judgment in householder cases, with a different emphasis to that which applies in other cases.’¹⁷⁰ For example, a failure to retreat in a householder case may be reasonable albeit disproportionate, but in a non-householder case that would be unreasonable.¹⁷¹ It is unclear why this provision should apply solely to the householder, and not the primary victim who is also likely to be attacked in his/her own home. Section 76(5A), if it is to apply at all, should apply equally to offenders, and for cases where the force is unreasonable a new partial defence predicated on excessive self-defence operating in NSW¹⁷², supplemented with a ‘social framework’ provision is advanced.¹⁷³

Publication (ix) advances a partial defence predicated on a fear of serious violence and several filter mechanisms designed to accommodate the circumstances of the primary victim. The proposed framework builds upon the research underpinning Parts Three-Four. It draws upon the earlier recommendations of the Law Commission for E&W,¹⁷⁴ and a comprehensive review of the operation of sections 54-55 of CAJA 2009, but the proposals reject the paradoxical loss of self-control requirement and sexed normative

¹⁶⁸ *Collins* (n 55) [19]-[20].

Recently, a Joint Statement¹⁶⁹ regarding the use of force against intruders, stated the force used must continue to be reasonable in the circumstances, even where it is, upon reflection, disproportionate. Crown Prosecution Service, *Householders and the use of force against intruders* (Joint Public Statement from the Crown Prosecution Service and the Association of Chief Police Officers) available at: <<https://www.cps.gov.uk/publications/prosecution/householders.html>> accessed 24 October 2015.

¹⁷⁰ *Collins* (n 55)[23].

¹⁷¹ *ibid*.

¹⁷² Section 421 of the Crimes Act 1900 (NSW) provides as follows: if (a) the person uses force that involves the infliction of death, and (b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary: (c) to defend himself or herself or another person, or (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person. (2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

¹⁷³ As discussed in Part Three.

¹⁷⁴ Law Com No 290, 2004 (n 31).

standard. This new framework is complemented by social framework evidence¹⁷⁵ and mandatory jury instructions, drawing from the law in Victoria.¹⁷⁶ An interlocutory appeal procedure designed to prevent appellate court litigation is outlined. This model provides an appropriate *via media* and optimal solution to the problems faced by primary victims in Victoria and NZ, where all general partial defences have been abolished.¹⁷⁷ The partial defence has been drafted and is currently under consideration by the New Zealand Law Commission as part of its project on victims of family violence who commit homicide.¹⁷⁸

¹⁷⁵ As explored in Part Three.

¹⁷⁶ Jury Directions Act 2013, sections 31 and 32, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, part 4.

¹⁷⁷ This framework is fully drafted in Appendix F.

¹⁷⁸ NZ Law Com IP 39, 2015 (n 11).

Publication (viii)

'Battered women, startled householders and psychological self-defence: Anglo-Australian Perspectives' (2013) *Journal of Criminal Law* 77(5), 433-457.

Journal of Criminal Law

2013

Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives

Nicola Wake

Subject: Criminal law

Keywords: Australia; Defences; Loss of control; Provocation; Self-defence

Legislation: Coroners and Justice Act 2009 (c.25) s.54, s.55, s.56

Criminal Justice and Immigration Act 2008 (c.4) s.76

***J. Crim. L. 433** *Abstract* This article provides a timely and critical reappraisal of the interconnected, but discrete, doctrines of loss of self-control, under ss 54-56 of the Coroners and Justice Act 2009, and self-defence within s. 76 of the Criminal Justice and Immigration Act 2008. The loss of control conceptualisation renders it difficult for defendants to claim the partial defence where exculpatory self-defence has been rejected, and fear of serious violence is adduced. This doctrinal incoherence has been exacerbated by the fact that s. 43 of the Crime and Courts Act 2013 effectively legitimises the use of disproportionate force in self-defence, but only in 'startled householder' cases. A more appropriate avenue of reform is provided by developments in Australian jurisdictions. This comparative extirpation engages the introduction of a new partial defence of self-preservation/psychological self-defence predicated on the notion of excessive utilisation of force in self-defence as in New South Wales, supplemented with a 'social framework' provision, akin to that in Victoria. The new defence would avoid the problems associated with requiring the abused woman to establish a loss of self-control and/or affording an affirmative defence in 'startled householder' cases.

Keywords Australia; Excessive use of force in self-defence; New South Wales; Loss of control; Social framework evidence

The loss of control defence exists as a paradigm illustration of the difficulties associated with over-emphasising political policy at the expense of optimal and coherent criminal justice reform. The partial defence as enacted in ss 54-56 of the Coroners and Justice Act 2009¹ deviated significantly from the Law Commission's recommendations. The government abolished provocation,² rejected the Law Commission's ***J. Crim. L. 434** schematic hierarchical template for homicide offences³ and arbitrarily selected aspects of the Law Commission's coherent reform package⁴ for the purpose of introducing the new defence.⁵ This piecemeal approach has resulted in tautological and imprecise terminology with resultant implications at both a practical and doctrinal level.

This article focuses specifically on the government's controversial decision to predicate the partial defence on a 'loss of self-control' threshold filter mechanism contrary to the Law Commission recommendations. It reviews the problems associated with the 'loss of control' conceptualisation and considers the extent to which this requirement impacts upon defendants who seek to use this partial concessionary mitigation as a fall-back option in cases where self-defence is rejected. Recent amendments under the Crime and Courts Act 2013⁶ have exacerbated the difficulties in this area by placing the 'startled householder' in a better position than every other defendant in cases involving self-defence. This analysis is supplemented by an in-depth consideration of the applicability of excessive self-defence in Australia, specifically New South Wales, and recent reform recommendations on provocation in that jurisdiction.⁷

The partial loss of control defence is designed to be available where a defendant kills in response to a fear of serious violence. Under s. 54 (7) of the Coroners and Justice Act 2009 a successful plea operates to reduce a murder conviction to voluntary manslaughter. At an operational level a fear of serious violence may be fundamentally incompatible with the notion of a loss of self-control. A defendant claiming exculpatory self-defence on the basis of a fear of serious violence should be able to revert to the loss of control defence where the initial plea fails. In practice, however, a defendant alleging self-defence is claiming that his or her conduct was reasonable in the circumstances and in many cases this is at odds with any claim that the defendant's actions were borne out of a loss of

self-control. The only exception arises in relation to s. 43 of the Crime and Courts Act 2013 which effectively legitimises the use of disproportionate force in 'startled householder' cases. In such cases, the defendant's argument that he used disproportionate force to repel an intruder **J. Crim. L. 435* might be viewed as support for any subsequent claim that he lost his self-control, should self-defence be rejected.

In terms of doctrinal coherence and appropriate standardisation, a more appropriate avenue of reform would have been to introduce a new partial defence of self-preservation/psychological self-defence predicated on the notion of excessive self-defence as in New South Wales, supplemented with a 'social framework' provision, akin to that in Victoria, as discussed below. The new defence would circumvent the difficulties associated with requiring the abused woman to establish a loss of self-control and provides a more appropriate reflection of the defendant's culpability where the homeowner utilises disproportionate force in order to repel an intruder.

Loss of self-control

There are three essential components to the English loss of control defence that are established in the Coroners and Justice Act 2009. The first requires the killing to have resulted from the defendant's loss of self-control.⁸ The loss of control need not be sudden,⁹ but the defence will not operate where the defendant has acted in a considered desire for revenge.¹⁰ The second component provides that the loss of control must be attributable to at least one of two qualifying triggers, or a combination of both. The first qualifying trigger is satisfied by a thing said or things done or said (or both) which constituted circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged (the 'seriously wronged trigger'). The second qualifying trigger requires the defendant to fear serious violence from the victim against the defendant or another identified person (the 'fear trigger').¹¹ The mitigation is unavailable to the defendant who, looking for trouble to the extent of inciting or exciting violence, loses his control¹² and the fact that a thing done or said constituted sexual infidelity is to be disregarded.¹³ The final component requires the jury to assess whether a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of defendant, might have reacted in the same or a similar way (the 'ordinary person' test).¹⁴ The defendant's circumstances extends to 'all' of the circumstances except those bearing on his general capacity for tolerance and self-restraint.¹⁵

A significant divergence between the partial defence as enacted and the Law Commission's recommendations is the implementation of the loss of self-control requirement. The Law Commission advised against **J. Crim. L. 436* the use of the confusing terminology and indicated that the term might make it difficult for abused defendants to claim the concessionary mitigation. A commendable outcome of the Law Commission's recommendations was that, in the absence of the loss of control requirement, the partial defence could be cogently aligned with the law on self-defence; where self-defence fails, the new partial defence, which encompasses killing out of a fear of serious violence, might apply.¹⁶ In this regard, the use of excessive force in self-defence is incorporated into the new plea.¹⁷ The 'fear trigger' is designed to apply where the defendant is unable to satisfy the requirements of self-defence because the force used was more than is objectively reasonable in the circumstances as the defendant believed them to be,¹⁸ or the threat was not sufficiently imminent.¹⁹ When an abused woman kills her partner, she will rarely be able to claim self-defence, either because the force used was disproportionate²⁰ or she is unable to prove that the threat was imminent.²¹ Unfortunately, the government's decision to qualify the 'fear trigger' with the controversial 'loss of self-control' conceptualisation has undermined the doctrinal coherence in the Law Commission's recommendations, rendering the partial defence 'unnecessarily complex'.²²

In its interpretation of ss 54-56 of the Coroners and Justice Act 2009, in *R v Dawes, Hatter and Bowyer*,²³ the Court of Appeal suggested that the loss of control threshold may make it more difficult for defendants to **J. Crim. L. 437* rely on the partial defence where a claim of exculpatory self-defence has been unsuccessful. The Lord Chief Justice noted that although there 'will often be a factual overlap' between the loss of self-control defence and self-defence, 'there are obvious differences between the two defences and they should not be elided'.²⁴ Referring specifically to circumstances in which the defendant attempts to raise loss of control and self-defence, the court identified that '[t]he circumstances in which the defendant, who has lost control of himself, will nevertheless be able to argue that he used reasonable force in response to the violence he feared, or to which he was subjected, are likely to be limited'.²⁵ Evidence of a loss of self-control will not necessarily prevent a successful self-defence claim, provided the violent response was not unreasonable in the circumstances.²⁶ In cases where the defendant genuinely fears serious violence,

then his response may legitimately be more extreme.²⁷ In such cases 'it is likely that in the forensic process those acting for the defendant will advance self-defence as a complete answer to the murder charge, and on occasions, make little or nothing of the defendant's response in the context of the loss of control defence'.²⁸

Difficulties are more likely to arise in cases where self-defence is rejected. As a procedural factor, a self-defence claim does not bar the loss of control defence and provided the statutory conditions pertain the partial defence should be left for fact-finder evaluation.²⁹ It should be remembered that unlike self-defence, the loss of control defence requires D to fear *serious* violence from the victim or another identified person. There is also no requirement that D's response was reasonable. Where the partial defence might apply, the 'practical course' is to leave the concessionary mitigation to the jury after it has rejected exculpatory self-defence.³⁰ Issues may arise where the defendant, who has alleged that he or she was acting reasonably in the prevailing circumstances, attempts to claim that his or her response was borne out of a loss of control. Terms such as 'lost the plot', 'snapped', and 'went berserk' ***J. Crim. L. 438** which are commonly used to establish a loss of self-control³¹ might be viewed as implying that the defendant's conduct was not reasonable in the prevailing circumstances.³² In the majority of cases where the defendant alleges a loss of self-control, the fact that the defendant acted disproportionately is likely to support the assertion that the defendant lost his or her self-control. In cases involving a change in plea from self-defence to loss of self-control jurors may become confused and the defendant could appear to be disingenuous.

The problems associated with the inter-relationship between the partial defence and self-defence are not limited to the abused defendant and may extend to other cases in which the defendant attempts to utilise loss of control as a fall-back option, by adducing a fear of serious violence. Although Parliament has attempted to delimit the difficulties associated with the threshold test by stipulating that the loss of control need not be sudden, the partial defence continues to place a premium on anger over fear.³³ This doctrinal incoherence is exacerbated by s. 43 of the Crime and Courts Act 2013 which effectively legitimises the use of disproportionate force in self-defence, but only in 'startled householder' cases. The result is that, in cases of this context, the threshold for establishing self-defence is lowered and the claim that disproportionate force was used may also imply a loss of self-control rendering it easier for the 'startled householder' to claim either defence. The following four postulations (the 'football supporter', the 'abused woman', the 'British soldier', and the 'startled householder') are utilised to demonstrate the extent to which the 'loss of control' requirement has undermined the Law Commission's proposals, and has the potential to result in arbitrary outcomes:

1. D was walking home from a football match with several friends (A, B and C) when they met with some supporters of the away team. Both groups chanted about the opposing team. One of the away fans (V) punched B and then advanced towards D, brandishing ***J. Crim. L. 439** what D believed was a knife. D pulled a knife from his jacket pocket and stabbed V, killing him. V had been carrying a silver tobacco tin (the 'football supporter').³⁴
2. D and V live together, but their relationship is a violent one. V frequently hits D when he (V) comes home drunk. One night, when V comes home drunk and threatens to beat D yet again, she goes to the kitchen, fetches a knife, and stabs V in the chest while he is off guard. V dies (the 'abused woman').³⁵
3. A British soldier (D), on patrol in Northern Ireland, opened fire on the occupants of a stolen car which had failed to stop at a checkpoint. D believed that the life of his colleague on the opposite side of the road was in danger. He fired three shots at the windscreen of the car and a fourth shot at the side of the car as it was passing. The final shot killed one of the passengers (the 'British soldier').³⁶
4. D was awoken by the sound of smashed glass. D picked up his golf club and went downstairs to investigate. D was confronted by an intruder (V) and he responded by hitting V repeatedly over the head with the golf club, killing him (the 'startled householder').

The first illustration above highlights the situation where D uses excessive force in response to a perceived threat.³⁷ D may rely on self-defence provided that the use of force is reasonable in the circumstances as he honestly and instinctively believed them to be.³⁸ It is irrelevant that D's belief may be regarded unreasonable providing it was genuinely held.³⁹ D ought not to be deprived of the exculpatory doctrine simply ***J. Crim. L. 440** because his actions might have given rise to the need to act in self-defence.⁴⁰

We need to say as clearly as we may that it is not the law that if a defendant sets out to provoke another to punch him and succeeds, the defendant is then entitled to punch the other person ... The

reason why this is not the law is that underlying the law of self-defence is the common-sense morality that what is not unlawful is force which is reasonably necessary ... Of course it might be different if the defendant set out to provoke a punch and the victim unexpectedly and disproportionately attacked him with a knife.⁴¹

The jury may still reject self-defence where the force used was excessive in the circumstances as D mistakenly believed them to be.⁴² In this instance, D may choose to rely on the loss of control defence. Even if D's mistaken belief was unreasonable, he will be able to rely on the partial defence provided the remaining elements are satisfied.⁴³ The fact that D may have been looking for and provoking trouble does not preclude the availability of the concessionary defence, unless his actions were intended to provide him with an opportunity to use violence.⁴⁴ The qualifying trigger based on a fear of serious violence will almost inevitably include a consideration of things said and done (i.e. the football chants and previous violence against B),⁴⁵ and D may claim that when faced with what he believed to be a 'fight-or-flight'⁴⁶ situation, he lost his self-control.

A more nuanced approach needs to be deconstructed and adopted in relation to postulation 2, which is taken verbatim from the Law Commission's 2006 report.⁴⁷ The 'loss of self-control' conceptualisation is antithetical to the pattern of psychological and behavioural responses exhibited in response to long-term physical and emotional abuse⁴⁸ --'her state of mind and manifestation of behaviour at the time of the **J. Crim. L. 441* killing are not a loss of self-control in the traditionally masculinist sense at all. Nor is she in the period before the killing in a state of anger. She is in a state of fearful contemplation'.⁴⁹ Yet paradoxically, the abused defendant will have to claim that she *feared serious violence and lost self-control* in response to the 'cumulative impact' of the domestic abuse.⁵⁰

[T]he battered abused woman in fear has to conform, it would appear, to an outward expression of loss of self-control predicated on the vehement passion of anger when her emotional state and state of mind are intractably one of fear as is her response to the violence which presents itself.⁵¹

The fact that D's loss of control was not sudden does not negate the partial defence,⁵² however, the lack of immediacy renders it difficult to assess whether D truly lost self-control. The removal of the suddenness requirement will make it challenging to evaluate whether the killing was borne out of a considered desire for revenge⁵³ or alternative motivations.⁵⁴ The Law Commission's recommendations, which abrogated the loss of control mandate, were specifically targeted towards ensuring that the defence would be accessible to abused women. Unfortunately, the government's emphasis on delimiting the defence in cases involving gang-related violence⁵⁵ and honour killings⁵⁶ means that the abused defendant will continue to find it difficult to satisfy the revised plea.⁵⁷

**J. Crim. L. 442* The availability of a partial defence predicated on a loss of self-control is contrary to normative societal expectations that people 'maintain control'.⁵⁸ It is inappropriate to ground the defence in terminology for which there is no existing medical or scientific criterion against which to assess whether the defendant truly lost self-control.⁵⁹ The requirement 'may not be apt to describe the ultimate issue that the jury has to decide, namely whether the defendant's tolerance and his/her self-restraint were overborne by his/her circumstances'.⁶⁰ At an operational level, the loss of self-control requirement might be viewed as an inability to comport oneself with normative societal expectations⁶¹ in order for the abused defendant to be able to plead the partial defence successfully. This novel interpretation of the term would effectively render the 'loss of control' requirement nugatory in this type of case. It might have been preferable for the 'loss of control' requirement to have been limited to the 'seriously wronged' trigger,⁶² albeit that this may not prevent the availability of the partial defence in gang-related violence cases.⁶³ Nevertheless, it is worth remembering that under s. 54(6) the trial judge has the authority to filter out unmeritorious cases.

The loss of control conceptualisation does not only render the partial defence internally incoherent, but it has significant consequences at a doctrinal level. It would be difficult for the British soldier in scenario 3 to claim that he lost self-control in the exercise of his duty. The facts provided are derived from the case of *R v Clegg*,⁶⁴ in which the House of Lords declined to reduce culpable homicide from murder to manslaughter where a plea of self-defence had failed because the force used was excessive and unreasonable.⁶⁵ Lord Lloyd of Berwick asserted that **J. Crim. L. 443* 'the reduction of what would otherwise be murder to manslaughter in a particular class of case seems to me essentially a decision for the legislature, and not [the House of Lords/Supreme Court] in its judicial capacity'.⁶⁶ For the purposes of the use of self-defence outside of the home, an individual is permitted to use force that is reasonable in the circumstances as they believe them to be, in self-defence and/or defence of another.⁶⁷ The logical approach in cases of this context is to leave loss of control to the jury after it has rejected self-defence.⁶⁸ Clegg's claim was not that he lost self-control, but rather that

he acted in defence of another. In practice it will be incredibly difficult for D to establish a loss of self-control successfully after he has asserted that his response was reasonable in the circumstances. This could potentially lead to erroneous murder convictions and/or defendants claiming loss of control when self-defence might in fact apply.

Controversial amendments to s. 76 of the Criminal Justice and Immigration Act 2008 have the potential to exacerbate the aforementioned doctrinal incoherence between the loss of control requirement and self-defence. The Crime and Courts Act 2013⁶⁹ expands the ambit of defence of property beyond that of other self-defence pleas.⁷⁰ Prior to the enactment of the Crime and Courts Act 2013, a householder could use such force as was reasonable in the circumstances, as he believed them to be, in order to protect his property, but the use of disproportionate force would negate the defence. Section 43(2) of the 2013 Act amends s. 76 of the 2008 Act so that the use of disproportionate force is regarded as reasonable in 'startled householder' cases. The revised defence will be satisfied where it is established that the defendant believed that the use of force was necessary in the circumstances as he honestly believed them to be and that the force used was not grossly disproportionate.⁷¹ If successful, the defendant will be entitled to an outright acquittal.

Section 43(2) applies only where the victim was a trespasser in the defendant's dwelling.⁷² The contentious clause is intended to reduce the stress associated with possible prosecution when a householder has acted excessively,⁷³ whilst simultaneously providing better protection *J. Crim. L. 444 for householders⁷⁴ by permitting the use of disproportionate force in circumstances such as that identified in scenario 4 above.⁷⁵

Conservatives argue that the defence the law offers a householder should be much clearer and that prosecutions and convictions should only happen in cases where courts judge the actions to be 'grossly disproportionate'.⁷⁶

Notwithstanding these aims, the change in the law extends the level of violence that is permissible without clarifying the ambit of the defence. The Law Commission explained that public support for the view that the law should offer more protection to the homeowner⁷⁷ is predicated on a fundamental 'misunderstanding of the state of the present law, contributed to by incomplete understanding of certain notorious cases'.⁷⁸ The new provision, rather than protecting homeowners, could instead operate to place homeowners at an increased risk of violent attack. There are legitimate concerns that the level of force permitted in 'startled householder' cases could operate as a charter for vigilantism⁷⁹ and that it does not accord with the fact that most burglars do not want to come into contact with the homeowner.⁸⁰ Many will flee upon hearing a car *J. Crim. L. 445 pull into the driveway or when realising that someone is in the property. In light of the new law, 'startled householders' might become more inclined to intervene and 'burglars, knowing that they could be killed, might be more likely to carry weapons and/or use extreme violence. So [s. 43 of the Crime and Courts Act 2013] could be wholly counterproductive'.⁸¹

Unsurprisingly, the Court of Appeal in *Bowyer* ruled that the loss of control defence should not be made available to intruders who kill in this context.⁸² The defendant (B) knew his victim, because both were engaged in a relationship with a part-time prostitute known as Katie Gilmore.⁸³ B went to the victim's home in order to carry out a carefully planned burglary. When the victim returned home, B subjected him to a prolonged and violent attack with fatal consequences. At trial, B attempted to rely on the loss of control defence. According to his evidence, when the victim returned home he had rushed at B and a fight then ensued. B claimed that he feared serious violence at the hands of the victim and that he lost his self-control when the victim shouted: 'Katie's a prostitute, she's always going to be a prostitute and she's going to be my number one earner'.⁸⁴ The jury rejected the loss of control defence and B was convicted of murder. Following his conviction, B appealed on grounds that the trial judge had misdirected the jury in the context of the loss of control defence. The appeal was unanimously rejected, with the court noting that the one criticism that could be made of the trial judge was that he had left the partial defence to the jury:

At the very best, [Bowyer] suggests that he just snapped when, following the householder's return, he, the householder, reacted violently to the presence of the burglar in his home and used deliberately insulting remarks about the appellant's girlfriend. To that the somewhat colloquial answer is, 'So what?' If either of these men was justified in losing his self-control, it was the deceased.⁸⁵

R v Dawes, Hatter and Bowyer was decided prior to the implementation of the 2013 Act, but there is nothing to suggest that the s. 43 revisions will impact upon the approach adopted by the Court of Appeal in *Bowyer*. It would be 'absurd' to suggest that the understandable response of a homeowner

confronted by an intruder could form the basis of a loss of control plea.

***J. Crim. L. 446** A significant number of commentators have suggested that s. 43 will not significantly alter the current law on self-defence since householders who react with fatal consequences are rarely prosecuted,⁸⁶ suggesting that the change in the law may have more to do with political rhetoric than principled reform. Nevertheless, the revised test has the potential to raise the bar dangerously in terms of the amount of force which can legitimately be used in 'startled householder' cases: 'Do we really want to create a legal justice system where people are allowed to shoot dead someone who is only trying to steal their TV?'.⁸⁷ Paul Mendelle QC has vehemently argued that:

The law should encourage people to be reasonable, not unreasonable; to be proportionate, not disproportionate ... [the legislation has] in effect, sanctioned extrajudicial execution or capital punishment for an offence, burglary, that carries a maximum of 14 years, which is the sentence that Parliament decided was appropriate.⁸⁸

The use of grossly disproportionate force may result in a murder conviction where the prosecution successfully prove the requisite *mens rea*.⁸⁹ Determining the point at which force is to be regarded as grossly disproportionate is as decipherable as assessment of how many angels can dance on the head of a pin:

If I manage to tackle a criminal and get him to the ground, I kick him once, and that's reasonable, I kick him twice and that's understandable, three times forgivable, four times, debatable, five times, disproportionate, six times it's very disproportionate, seven times extremely disproportionate--eight times, and it's grossly disproportionate. It is a horrible test. It sounds like state-sponsored revenge.⁹⁰

***J. Crim. L. 447** It is disturbing that the government asserts that the line is crossed when it is abundantly clear that no further force is required, for example stabbing a burglar or stamping on his head while he is unconscious.⁹¹ Perplexed jurors will be required to engage in mental gymnastics in order to determine whether the defendant's conduct is to be regarded as reasonable, disproportionate or grossly disproportionate. There is also the question of how the changes will impact on the current law of mistaken belief. As noted, in cases involving mistaken belief, jurors are required to answer the hypothetical question of whether the force used by D was reasonable in the circumstances as he mistakenly perceived them to be. In the case of *R v Faraj*,⁹² the defendant threatened a gas repair man with a knife, mistakenly believing him to be a burglar. The Court of Appeal adumbrated that 'the householder must honestly believe that he needs to detain the suspect and must do so in a way which is reasonable'.⁹³ The reasonableness of the defendant's response and the amount of force used was to be assessed objectively based on the facts as the defendant believed them to be.⁹⁴ It appears that a new hypothetical test will need to be developed in 'startled householder' cases. Will jurors now be asked to assess whether the force used by D was grossly disproportionate in the circumstances as he mistakenly believed them to be? If the test is answered in the affirmative, the defence will be unavailable. The greater emphasis placed 'on what was believed at the time rather than what was the real situation' is likely to render the test to be applied in mistaken belief cases ostensibly more subjective where the 'startled householder' is concerned;⁹⁵ '[c]oupled with the permitted use of greater force, this could result in a drastic shift' in what is currently allowed.⁹⁶

If the startled householder's self-defence plea fails, he may claim loss of self-control based upon the fear trigger. As with scenario 1 above, the fact that D may have been mistaken as to the threat and/or that the force used was excessive will not preclude the availability of the partial defence. In the circumstances, D's conduct does not appear to be borne ***J. Crim. L. 448** out of a *considered* desire for revenge.⁹⁷ The fact that D armed himself may support the assertion that he feared serious violence.⁹⁸ The 'cumulative impact' of the thing done (the sound of broken glass/the break-in) will similarly be relevant in terms of establishing that D was afraid. D may argue that, when confronted, his 'fight-or-flight' mode was engaged causing him to lose self-control. Further, the rejected self-defence plea (that he used disproportionate force) may support the suggestion that D lost self-control.

Arguments that the 'startled householder' defence can be justified on the basis that the general public support the provision are fundamentally flawed. The new provision is dangerous in terms of the level of violence that it permits and Parliament has failed to address the potential problems that the new legislation creates. It is now the judiciary and fact-finders who are charged with interpreting and applying this enigmatic piece of legislation and it may well be the general public who are put at risk. The government's decision to amend the law arbitrarily in favour of one discrete category of defendant is also odd. The general public were outraged by the House of Lords' failure to reduce

Clegg's⁹⁹ murder conviction to one of voluntary manslaughter and the decision became one of the most politically sensitive in Northern Ireland when a campaign was launched to clear the soldier's name,¹⁰⁰ but Parliament did not see fit to extend the 'startled householder' defence to defendants who use disproportionate force outside of the context of home invasion cases. New s. 76(5A) of the Criminal Justice and Immigration Act 2008 effectively legitimises the use of disproportionate force in self-defence with a successful plea resulting in an outright acquittal in 'startled householder' cases, but not in cases like that of *Clegg* --this places the 'startled householder' in a better position than every other case of self- **J. Crim. L. 449* defence, where the defence will fail if the use of force was disproportionate. Defending the contentious proposition, Grayling, asserts:

Being confronted by an intruder in your own home is terrifying, and the public should be in no doubt that the law is on their side. That is why I am strengthening the current law. Householders who act instinctively and honestly in self-defence are victims of crime and should be treated that way.¹⁰¹

This rationale distinguishes *Clegg* from home invasion cases, but it cannot be convincingly reconciled with cases involving prolonged and systematic violent domestic abuse suffered in the familial home. The 'abused woman' who kills using disproportionate force in the home does not benefit from this change in the law because the person who attacks her is not a stranger, but the person she lives with.¹⁰² As previously noted, it will be more difficult for the 'abused woman', rather than the 'startled householder' to claim the partial defence as a result of the 'loss of control' conceptualisation.¹⁰³

The availability of an exculpatory defence where the 'startled householder' kills using disproportionate force is fundamentally at odds with every other case in which self-defence applies. The rationale is sound in principle; the defence is extended to consider the circumstances of the defendant. In order to be entitled to an affirmative defence the defendant's conduct ought to be a proportionate response to the perceived threat otherwise a partial defence would be apposite in terms of appropriate standardisation of the defendant's culpability level.¹⁰⁴ It is inequitable to allow a complete acquittal in 'startled householder' cases and to restrict self-defence where the 'abused woman' is concerned.

In the context of the 'abused woman', the proportionality requirement is heavily criticised 'as reflecting only those cases where adversaries are of comparable strength', thereby failing to recognise that 'a discrepancy in physical strength may require the abused defendant to arm him or herself rendering it more likely that such conduct would be considered excessive'.¹⁰⁵ There is a 'fundamental difference in the method of killing by gender'.¹⁰⁶ Women are much likely to use weapons than men and this has significant implications at both prosecutorial and **J. Crim. L. 450* sentencing stage. In violent altercations the use of bodily force is considered a mitigating factor,¹⁰⁷ whereas the use of weapons in like circumstances is regarded an aggravating feature of the offence.¹⁰⁸

... yet again there has been a wholesale failure to recognise that women who kill men who abuse them resort to weapons because of very specific gendered reasons, including their relative size as compared to men, and their trained incapacity for self-defence. Women who use a weapon rather than body force are likely to receive a longer sentence than men who punch, stamp, kick, beat, or strangle their female victim. Modus operandi may well have an impact on final legal outcome.¹⁰⁹

Additionally, the imminence requirement precludes the availability of self-defence to defendants who kill whilst their abuser is off guard.¹¹⁰

Although the 'all or nothing' approach renders it too risky for the abused defendant to claim self-defence,¹¹¹ the Law Commission was satisfied that a reformulated provocation defence represented an appropriate vehicle through which to afford a partial defence to those who kill in fear of serious violence. The Commission considered that a separate partial defence predicated on excessive force would artificially compartmentalise anger (in the context of provocation/loss of self-control) and fear (in the context of self-defence), when in practice many cases involve a combination of those emotions.¹¹² It was felt that the objective requirement that, 'a person of ordinary tolerance and self-restraint might have reacted in the same way as the defendant' would appropriately limit the availability of the partial defence.¹¹³

The government's retention of the 'loss of control' requirement has raised the bar in cases where the defendant kills out of a fear of serious violence, while s. 43 of the 2013 Act has lowered it in 'startled householder' cases. Section 43 represents an acknowledgement of the psychological impact of the circumstances on the defendant:

[T]his form of trespass differs from others insofar as a home--what signifies psychologically to the occupant in terms of personal space, physical safety and security--is involved. The word 'invasion'

captures this and, indeed, the term 'home invasion' has become commonplace in countries like Australia, the United Kingdom and the United States.¹¹⁴

***J. Crim. L. 451** If it is appropriate to consider the circumstances of the 'startled householder' for the purposes of fact-finder evaluation in self-defence cases, it is equally important, in terms of appropriate standardisation and distributive justice, to acknowledge the invasion of physical and psychological integrity caused by domestic violence.¹¹⁵ The 'abused woman' who kills oscillates between being categorised as a victim of domestic abuse and a defendant charged with murder. A successful claim of self-defence may be justified because the defendant made the decision that others would in like circumstances,¹¹⁶ but it is essential that jurors are aware of those circumstances in order to make a fair evaluation. The impact of psychological abuse towards a victim has long been recognised¹¹⁷ and the extension of self-defence in 'startled householder' cases is indicative of a step towards recognising the contextual and psychological aspects of self-defence claims. It is essential to consider the cumulative impact that domestic violence has on the 'abused woman' in cases of this context. A new concessionary defence of psychological self-defence could provide the optimal solution.

A new partial defence

Recommendations for the introduction of a new partial defence predicated on the use of excessive force in self-defence in England and Wales have previously been advanced by the Criminal Law Revision Committee,¹¹⁸ a House of Lords Select Committee¹¹⁹ and the Law Commission.¹²⁰ The need for a partial defence in this context arises where the force used is unlawful because it was excessive or where the attack was ***J. Crim. L. 452** insufficiently imminent to satisfy the requirements of self-defence.¹²¹ Supporters of the introduction of a new partial defence commonly cite 'startled householder'¹²² and 'battered woman'¹²³ scenarios as fundamental reasons to introduce a new defence.

In New South Wales, self-defence¹²⁴, excessive self-defence¹²⁵, substantial impairment of the mind¹²⁶ and provocation¹²⁷ are all possible exculpatory and partial defences that are available depending upon the specific facts of the case.¹²⁸ Where the 'abused woman' believed that her conduct was necessary to defend herself against another and her actions were reasonable in the circumstances as she perceived them to be, self-defence will apply. If the force used is excessive, the defendant may be convicted of manslaughter¹²⁹ based upon excessive force in self-defence.¹³⁰ If the prosecution establish that the defendant did not honestly believe that defensive actions were necessary, for example, because the threat was not sufficiently imminent¹³¹, she may claim provocation based upon the domestic violence.

***J. Crim. L. 453** The New South Wales Legislative Council Select Committee on the Partial Defence of Provocation did not deem it necessary to incorporate an equivalent 'fear trigger' in its recommendations for reform to the partial defence of provocation. The Committee asserted that it would be inappropriate to reform the provocation defence in a manner which would create an overlap with excessive self-defence, albeit that a defensive element may exist in cases of 'gross provocation causing the defendant to feel a sense of being seriously wronged'.¹³² Self-defence and excessive self-defence were regarded as 'more appropriate vehicles [than provocation] to give effect to community expectations that victims of prior domestic violence should receive some leniency under the law', but it is recognised that the legislation needs to be developed in order to 'properly accommodate the circumstances of domestic violence'.¹³³ The Women's Domestic Court Advocacy Service contends that the admissibility of 'social framework' evidence with a focus on the context of domestic violence would assist in this regard.¹³⁴ Section 9AH of the Crimes Act 1958 (Vic)¹³⁵ provides a suitable framework on which to base such reform.¹³⁶ The provision states that for the purposes of murder, defensive homicide or manslaughter, in circumstances where domestic violence is alleged, the following evidence may be admissible in assessing liability:

- (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
- (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
- (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;

(d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;

(e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;

(f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.¹³⁷

***J. Crim. L. 454** There are obvious difficulties associated with introducing social framework evidence. Where expert testimony on battered women syndrome¹³⁸ is provided, this potentially has the effect of recasting the defendant as helpless or psychologically deranged suggesting that her conduct is irrational rather than understandable in the circumstances.¹³⁹ The use of contextual evidence must be circumscribed to avoid 'placing the victim on trial'. The trial of Clayton Weatherston marked the eventual demise of the provocation defence¹⁴⁰ in New Zealand, following the defendant's protracted televised testimony whereby he claimed that he had killed the victim because of 'the emotional pain that she [had] caused [him]'.¹⁴¹ Weatherston alleged that the victim had contracted an STI following casual sex with a stranger whilst on a trip. He led evidence that she attacked him and read extracts from her diary to the court which he claimed showed that she had a tendency towards violence.¹⁴² Weatherston's unrepentant televised testimony was branded a 'national disgrace'¹⁴³ and there was a prevailing view that Weatherston had used the provocation defence as a vehicle to place the victim on trial.¹⁴⁴ Despite the ostensible difficulties associated with the introduction of social framework evidence, the fact remains that in order to understand the 'circumstances' of the 'abused woman', contextual information must be adduced and the introduction of a social framework model, with appropriate limitations, would assist in ensuring that such evidence is made available under the same conditions in each case.

The introduction of a partial defence of self-preservation/psychological self-defence,¹⁴⁵ predicated on the notion of excessive self-defence in New South Wales combined with a 'social framework' provision akin to that in Victoria, provides a viable option for reform in England and Wales. This suggestion builds on earlier recommendations by the Law Commission. In its Consultation Paper, the English Law Commission posited several potential options for the development of a new partial defence predicated on the use of excessive force in self- ***J. Crim. L. 455** defence.¹⁴⁶ Option A involved an extension of the common law to afford a defence where the use of force is lawful based upon the defendant's subjective belief, but the amount of force used exceeds that which is reasonable. Option C involved the pre-emptive use of force in self-defence where the use of any force would usually be considered unlawful because the threat is not sufficiently imminent.¹⁴⁷

As a partial defence, self-preservation/psychological self-defence would assist in circumventing the difficulties associated with requiring the 'abused woman' to prove a loss of self-control, and could potentially be extended so that it may apply in cases akin to *Clegg*.¹⁴⁸ The social framework model could also be developed so as to bring within its ambit the 'startled householder'; fundamentally, the circumstances of individual cases become relevant for the purposes of juror evaluation. As a partial, rather than an affirmative, defence the recommendation avoids the problems associated with allowing an outright acquittal in 'startled householder' cases where the defendant uses disproportionate force.¹⁴⁹

Academicians have asserted that the inclusion of a specific partial defence predicated on excessive force in self-defence may lead to compromise verdicts of manslaughter where the defendant should have been acquitted on the basis of self-defence.¹⁵⁰ Yet, as previously noted, the concept of self-defence tends to operate unfairly in cases where a female defendant has armed herself because in her experience her unarmed resistance to an attack by him is likely to result in the escalation of that attack.¹⁵¹ Women typically use weapons in self-defence which results in a higher likelihood of a murder conviction.¹⁵² In this regard, the ostensibly 'gender-neutral concept of reasonableness' operates against the female defendant.¹⁵³

***J. Crim. L. 456** Self-defence 'as a win-or-lose option ... encourages the use of partial defences of [loss of self-control] and diminished responsibility when neither properly captures the nature of the dilemma in which battered women find themselves. A compromise move would be the development of a new partial defence to murder based on physical or psychological aspects, or self-preservation.¹⁵⁴

Conclusion

The loss of control requirement and 'startled householder' provision are emotive issues which are apt for newspaper headlines. Declaratory statements that the loss of control requirement will prevent gang members from claiming that they were provoked focus on very limited aspects of provocation claims. The 'startled householder' provision places a premium on home invasion cases and ignores other equally deserving defendants, perhaps because most voters have been or know someone who has been affected by burglary. This policy-over-principle approach has rendered the loss of control defence internally incoherent and at a doctrinal level this partial defence cannot be cogently aligned with affirmative self-defence and full exculpation.

Amendments to the provocation defence were designed to accommodate the plight of abused women. The fact that a woman in fear is more likely to resort to the use of a weapon or to kill when the threat is no longer imminent renders it very difficult for her to claim self-defence. The Law Commission's fear of serious violence trigger was introduced to provide an alternative route of exculpation, albeit partial, in cases where self-defence is unsuccessful. The government's decision to qualify the Law Commission's schematic template with the controversial 'loss of control' conceptualisation has effectively raised the bar for the 'abused woman'. At a practical level, the 'abused woman' will struggle to claim the defence. At a doctrinal level, a defendant who unsuccessfully attempts to claim self-defence under s. 76 of the Criminal Justice and Immigration Act 2008 will find it difficult to revert to the loss of self-control defence on the basis that the notion of an out-of-control defendant acting reasonably is inherently contradictory.

This issue is unlikely to arise where the 'startled householder' kills an intruder. Where exculpatory self-defence is rejected, the 'startled householder' may revert to the use of the partial loss of control defence, without the contradiction that prevails in the 'abused woman' scenario. This is because s. 43 of the Crimes and Courts Act 2013 legitimises the disproportionate use of force in self-defence, but only in the context of home invasion cases, where a successful plea results in an outright acquittal. The legitimisation of the use of disproportionate force under s. 43 unfairly places the 'startled householder' in a better position than every other defendant claiming self-defence. The provision does not appropriately reflect the defendant's culpability level and it cannot be reconciled with the plight of the 'abused woman'. It is inherently unjust to allow an affirmative defence in home invasion cases and to preclude **J. Crim. L. 457* that same defence in cases where the battered woman kills her abuser, simply because the person who intrudes on her physical and emotional integrity is known to her. Where the defendant uses disproportionate force in self-defence, the availability of a partial defence, rather than an affirmative defence is apposite in terms of criminal liability.

The implementation of a new partial defence of self-preservation/psychological self-defence provides an appropriate avenue for reform in this regard. By basing the law on the New South Wales doctrine of excessive self-defence, the partial defence avoids the problems associated with requiring the 'abused woman' to establish a loss of self-control, whilst acknowledging that when a woman kills her abuser her conduct is often regarded as excessive because she is more likely to use a weapon. The availability of the concessionary mitigation could be extended to bring within its ambit home invasion cases, which would more appropriately reflect the 'startled householder's' culpability level than the current position under s. 43 of the 2013 Act.

The novel concessionary mitigation ought to be supplemented with a carefully worded 'social framework' provision, akin to that in Victoria, which requires the court to consider the contextual ambit of self-defence claims. In all cases it is essential that the background to the defendant's plea is considered when assessing criminal liability: 'Social framework evidence is critical to changing the way in which we understand self-defence and any of the other partial defences ... Without that social framework evidence, we do not understand either the position of the victim or the defendant'.¹⁵⁵

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The author expresses her thanks to Professor Alan Reed (University of Northumbria) and Ben Livings (Senior Lecturer, University of Sunderland) for their invaluable comments on earlier drafts of this article. This article represents the views of the author.

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1. Sections 54-56 of the Coroners and Justice Act 2009 were brought into force on 4 October 2010 (see the Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010 (SI 2010 No. 816).

2. Coroners and Justice Act 2009, s. 56.
3. Law Commission, *Murder, Manslaughter and Infanticide*, Law Com. No. 304 (2006).
4. This includes the decision to expand the partial defence so that it applies to those who kill in response to a fear of serious violence; limiting the defence in other circumstances so that it applies only where the words or conduct, or a combination of both, cause the defendant to have a justifiable sense of being seriously wronged; redeveloping the 'objective test' by replacing the 'reasonable man' requirement with the concept of a 'normal degree of tolerance and self-restraint'; and realigning the province of judge and jury as arbiters of the partial defence. See Law Commission, above n. 4.
5. Other deviations include the government's decision to recognise explicitly the relevance of the defendant's sex with regard to the evaluative standard.
6. It is worth noting that this Act was preceded by amendments to the Criminal Justice and Immigration Act 2008 by s. 148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. See also *R v McInnes* [1971] 1 WLR 1600; *R v Faraj* [2007] EWCA Crim 1033.
7. New South Wales Legislative Council Select Committee (NSWLCSC), *The Partial Defence of Provocation* (2013) paras 9.18-9.19, available at <http://www.parliament.nsw.gov.au/provocationcommittee>, accessed on 13 August 2013.
8. Coroners and Justice Act 2009, s. 54(1)(a).
9. Coroners and Justice Act 2009, s. 54(2).
10. Coroners and Justice Act 2009, s. 54(4).
11. Coroners and Justice Act 2009, ss 54(1)(b), 55(2), (3),(4)(a) and (4)(b).
12. Coroners and Justice Act 2009, s. 55(6)(a)-(b).
13. Coroners and Justice Act 2009, s. 55(6)(c).
14. Coroners and Justice Act 2009, s. 54(1)(c).
15. Coroners and Justice Act 2009, s. 54(3). For further discussion on this aspect of the partial defence, see *R v Asmelash* [2013] EWCA Crim 157, (2013) 77 JCL 292, commentary by A. Jackson and N. Wortley.
16. A. Norrie, 'The Coroners and Justice Act 2009--Partial Defences to Murder (1) Loss of Control' [2010] Crim LR 275.
17. Law Commission, *Partial Defences to Murder*, Law Com. Report No. 290 (2004) para. 1.15.
18. *R v Owino* [1996] 2 Cr App R 128, [1995] Crim LR 743, CA.
19. See, e.g., *Cook's case* (1639) Cro Car 537; *R v Whalley* (1835) 7 C & P 245; *R v Patience* (1837) 7 C & P 775; *R v Weston* (1879) 14 Cox CC 346; *R v Biggin* [1920] 1 KB 213 at 219 and *Attorney-General for Northern Ireland's Reference (No. 1 of 1975)* [1977] AC 105 at 139B-G, 148, 156B.
20. In *R v Ahluwalia* [1992] 4 All ER 889, D set fire to her husband's bedroom as he slept. For further discussion on this aspect of the loss of control defence, see S. Edwards, 'Loss of Control: When His Anger Is Worth More than Her Fear' in A. Reed and M. Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: Farnham, 2011).
21. See, e.g., *R v Thornton* [1992] 1 All ER 306 where the defendant stabbed her husband after he threatened that he would kill her in her sleep. See also Law Commission, above n. 18 at para. 3.91; D. Ormerod, *Smith and Hogan's Criminal Law*, 13th edn (Oxford University Press: Oxford, 2011) 515; K. O'Donovan, 'Defences for Battered Women Who Kill?' (1991) 18 *Journal of Law and Society* 219; C. Wells, 'Battered Woman Syndrome and Defences to Homicide: Where Now?' (1994) 14 *Legal Studies* 266.
22. Ormerod, above n. 22 at 513. This article focuses on the interrelationship between the loss of control requirement and the 'fear trigger'. It should be noted, however, that similar problems arise in relation to the loss of control conceptualisation and the 'seriously wronged' trigger. For further discussion on this aspect of the partial defence, see Norrie, above n. 17. It should also be pointed out that in the majority of cases the defendant may attempt to rely on a combination of the qualifying triggers: *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308.
23. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308. See also L. H. Leigh, 'Clarifying the Loss of Control Defence' (2013) 177 *Criminal Law and Justice Weekly* 458; '*R. v Dawes; Hatter; Bowyer* : Loss of Control' (2013) *Archbold Review* Issue 5, 14 June 2013, 2 (Cases in brief).
24. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [59]. For a detailed examination of the differences between the two defences, see Ormerod, above n. 22 at 513.
25. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [59].

26. Ibid.

27. Ibid. See also the Joint Statement from the Crown Prosecution Service and the Association of Chief Police Officers, which provides as follows: 'so long as you do what you honestly and instinctively believe is necessary in the heat of the moment that would be the strongest evidence of you acting lawfully and in self-defence. This is still the case if you were to use something to hand as a weapon' (Joint Public Statement from the Crown Prosecution Service and the Association of Chief Police Officers, *Guidance Published on the Use of Force by Householders against Intruders* (CPS and ACPO: 2005), available at: http://www.cps.gov.uk/news/press_releases/110_05/, accessed 13 August 2013. The defence will arguably be easier to establish in home invasion cases invoking s. 43 of the Crime and Courts Act 2013 where the defence is satisfied provided the force used was not grossly disproportionate. This point is considered in more detail below.

28. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [59].

29. Ibid.

30. Ibid.

31. R. Fortson QC, 'Homicide Reforms under the CAJA 2009', *Criminal Bar Association of England and Wales*, 13 October 2010, para. 95, available at http://www.rudifortson4law.co.uk/legaltexts/HomicideOffences_CBA_handout_for_16thOct2010_R_Fortson_submitted_v.7.pdf, accessed on 13 August 2013. See also S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Control' (2010) 74 JCL 223.

32. It also suggests that the response ought to be sudden. However, Parliament have caveated the loss of control mandate by stipulating that it need not be (Coroners and Justice Act 2009, s. 54(2)). See also Fortson, above n. 32.

33. NSWLCSC, above n. 8 at paras 9.18-9.19. An abused woman's reaction is less likely to involve a 'loss of self-control', but rather 'a combination of anger, fear, frustration and a sense of desperation' and sometimes relief after the killing: Law Commission, above n. 4 at paras 5.18-5.19. See also Edwards, above n. 34; Law Commission, above n.18 at para. 3.91; L. Walker, *The Battered Woman Syndrome*, 2nd edn (1999) 43-73; A. McColgan, 'In Defence of Battered Women Who Kill' (1993) 13 *Oxford Journal of Legal Studies* 508; M. A. Buda and T. L. Butler 'The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence' (1984/85) 23 *Journal of Family Law: University of Louisville* 359; J. Blackman, *Intimate Violence: A Study of Injustice* (Columbia University Press: 1989); A. Browne, *When Battered Women Kill* (Free Press: New York, 1987); D. Bricker, 'Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners' (1993) 58 *Brooklyn Law Review* 1379; Edwards, above n. 32; see Ormerod, above n. 22 at 513.

34. A similar scenario was provided by the Law Commission: 'D is an armed police officer called to a house where a neighbour has said there is a man (V) with what looked like a gun. When the officer enters the house, V appears to have something in his hand. D demands that V show him what is in his hand but V does not respond. D shoots V and V dies. It turns out that V had a small metal bar in his hand. V may not have heard what D said because he (V) suffered from deafness' (Law Commission, above n. 4 at para. 5.50).

35. Note that scenario 2 is repeated verbatim from Law Commission, above n. 4 at para. 5.50. Although the term 'abused woman' will be used throughout this article, it is recognised that men also suffer from domestic violence (E. Duggan, 'Domestic violence: as a man, it's very difficult to say I've been beaten up', *Independent*, 14 April 2013, available at: <http://www.independent.co.uk/life-style/health-and-families/health-news/domestic-violence-as-a-man-its-very-difficult-to-say-ive-been-beaten>, accessed on 13 August 2013).

36. This scenario replicates the facts of *R v Clegg* [1995] 1 AC 482, HL. Clegg, a British soldier on patrol in Northern Ireland, opened fire on the occupants of a stolen car which had failed to stop at a checkpoint. According to his evidence, Clegg believed that the life of his colleague on the opposite side of the road was in danger. He fired three shots at the windscreen of the car and a fourth shot at the side of the car as it was passing. The trial judge ruled that the final shot, which killed the rear seat passenger, was not fired in self-defence.

37. If the use of force was not reasonable in the circumstances as the defendant believed them to be, self-defence will be rejected: *Palmer v R* [1971] AC 814. See also Crown Prosecution Service, *Self-Defence and the Prevention of Crime* (2013), available at http://www.cps.gov.uk/legal/s_to_u/self_defence/, accessed on 13 August 2013.

38. *R v Gladstone Williams* (1984) 78 Cr App R 276. See also *Beckford v R* [1987] 3 All ER 425; Ormerod, above n. 22; S. Miller, 'Grossly Disproportionate: Home Owners' Legal Licence to Kill' (2013) 77 JCL 299; Criminal Justice and Immigration Act 2008, s. 76.

39. *R v Gladstone Williams* (1984) 78 Cr App R 276 at 281.

40. Ormerod, above n. 22 at 391. See also *R v Balogun* [1999] EWCA Crim 2120; *R v Rashford* [2005] EWCA Crim 3377, [2006] Crim LR 547.

41. *R v Keane* [2010] EWCA Crim 2514.

42. *R v Owino* [1996] 2 Cr App R 128, [1995] Crim LR 743, CA.

43. See Ormerod, above n. 22.

44. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [58]. See also *R v Dawes*; *R v Hatter*; *R v Bowyer* (2013) 77 JCL 189, commentary by T. Storey. This scenario might also give rise to issues of accessory liability. For further information regarding this area of law, see the leading monograph: A. Reed and M. Bohlander (eds), *Participation in Crime* (Ashgate Publishing: Farnham, 2013).
45. Coroners and Justice Act 2009, s. 55(3)-(5). See also *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [56].
46. Also known as the 'freeze, flight, fright, fight or faint' response (H. S. Bracha, 'Freeze, Flight, Fight, Fright, Faint: Adaptionist Perspectives on the Acute Stress Response Spectrum'(2009) 9 *Review Article* 9, available at: http://cogprints.org/5014/1/2004_C.N.S_Five_Fs_of_FEAR--Freeze_Flight_Fight_Fright_Faint.pdf, accessed on 13 August 2013).
47. Note that scenario 2 is repeated verbatim from Law Commission, above n. 4 at para. 5.50.
48. '[I]t is the details of anger that these features of the will can be grasped more easily. Anger has been subjected historically to the most detailed scrutiny because of the acts of violence to which anger leads. Anger is the necessary bridge between a purely detailed account of the passions and an interest in action, because it is with anger that the aroused state in the soul or spirit has the most immediate links to the physical acts of our fists or our body in the outer world': P. Fisher, *The Vehement Passions* (Princeton University Press: 2002) 172.
49. See Edwards, above n. 21 at 88.
50. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308.
51. See Edwards, above n. 21 at 88.
52. Coroners and Justice Act 2009, s. 54(2).
53. Coroners and Justice Act 2009, s. 54(4).
54. '[T]he expression "considered desire for revenge" achieves the right balance in ensuring that thought-out revenge killings are excluded without automatically barring every case where revenge may be a part of a complex range of motivations': Ministry of Justice, *Additional Memorandum Submitted by the Ministry of Justice*, CJ 28 (2009), available at: <http://www.publications.parliament.uk/pa/cm200809/cmpublic/coroners/memos/ucm2802.htm>, accessed on 13 August 2013.
55. Ministry of Justice, *Murder, Manslaughter and Infanticide*, MoJ CP/R 19/08 (2009), available at: <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/docs/murder-review-response.pdf>, accessed on 13 August 2013.
56. Law Commission, above n. 4 at C-9-C-13. Carline contends that governmental concern regarding honour killings rests upon 'stereotypical assumptions' with regards to ethnicity, culture and religion. She states that '[h]onour killings have been condemned by Muslim leaders and the Asian community and thus it is by no means accepted that "inappropriate behaviour" of females is considered sufficiently grave so to justify a violent response--whether fatal or non-fatal ... This is not to state that violence committed in the name of "honour" does not take place, it undoubtedly does. However there is a distinction between recognising the existence of such activity and maintaining that it would fall within the parameters of the justifiably seriously wronged partial defence. To state that cultural evidence would support a contention that a defendant was justifiably seriously wronged is to assume that killing in such situations is acceptable within that culture--this is patently not the situation': A. Carline, 'Reforming Provocation: Perspectives from the Law Commission and the Government' [2009] 2 *Web Journal of Current Legal Issues*, available at: <http://webjcli.ncl.ac.uk/2009/issue2/carline2.html>, accessed on 13 August 2013. See also, J. Sugden, "Call it a crime of dishonour" say Muslim leaders', *The Times*, 12 June 2007 available at <http://www.thetimes.co.uk/tto/faith/article2098401.ece>, accessed on 13 August 2013.
57. Carline, above n. 57.
58. NSWLCSC, above n. 8 at para. 9.17.
59. Ibid. at para. 9.16.
60. See Fortson, above n. 32 at para. 94.
61. R. Holton and S. Shute, 'Self-control in the Modern Provocation Defence' (2007) 27 *Oxford Journal of Legal Studies* 49.
62. Note, however, the difficulties associated with claiming that D lost his self-control in response to a *justified* sense of being seriously wronged: Norrie, above n. 17.
63. Note that s. 55(6)(a) and (b) of the Coroners and Justice Act 2009 may not be sufficient to filter out this type of case on the basis that the defendant's conduct may not have been undertaken for the purpose of providing an excuse to use violence. Section 55(6)(a) and (b) provides as follows: In determining whether a loss of self-control had a qualifying trigger--(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use

violence.

64. [1995] 1 AC 482, HL.

65. The final shot was fired after the threat had passed and as such self-defence did not apply. See also *Palmer v R* [1971] AC 814 at 824. The ruling in *Clegg* was heavily criticised: 'It is a sad day for British justice when we employ service men in dangerous situations and ask for perfection. One is reminded of the story of the lawyer who, taking a volume down from the shelf said, "You know I think the policeman made a mistake in this case." His colleague retorted, "Maybe but he didn't have a law library available to him when he made his decision." Terrorist gunmen do have a choice when they take aim' (R. Jerrard, 'The Plea of Self-defence in Murder: Soldiers or Police Officers, No Special Case' (1995) 68 *Police Journal* 267 at 269).

66. *R v Clegg* [1995] 1 AC 482, HL.

67. Criminal Justice and Immigration Act 2008, s. 76.

68. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [59].

69. The Crime and Courts Act 2013 received Royal Assent on 25 April 2013 (Crime and Courts Act 2013 (Commencement No. 1 and Transitional and Saving Provision) Order 2013 (SI 2013 No. 1042)).

70. See Miller, above n. 39 at 301.

71. Section 43 of the Crime and Courts Act 2013 inserts new subs. (5A) into s. 76 of the Criminal Justice and Immigration Act 2008: '(5A) In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances'. This aligns the criminal law with civil law (Criminal Justice Act 2003, s. 329(4)(b)).

72. Crime and Courts Act 2013, s. 76(8A)-(8C).

73. Ministry of Justice, *Use of Force in Self Defence at a Place of Residence*, Circular No. 2013/02 (2013) advises that s. 43 of the Crime and Courts Act 2013 should be read alongside the revisions to Police and Criminal Evidence Act 1984, Code G (arrest), effective from 12 November 2012. CPS and ACPO have issued a joint statement to which prosecutors should have regard (see above n. 28).

74. The case of *R v Martin* [2001] EWCA Crim 2245, [2003] QB 1 is a fundamental example of the type of defendant this Act is designed to assist. Commenting on the case, Morris stated: 'By the time Tony Martin made his first court appearance charged with the murder of teenage burglar Fred Barras, his case had become a cause célèbre. Neighbours and strangers alike held a demonstration outside King's Lynn magistrates' court demanding his release and some sections of the media were already lionising him. He was depicted as the ordinary man who, plagued by burglars and let down by the police, had struck back but was now being persecuted for his actions. Over the coming months, politicians, commentators and public opinion turned the Norfolk farmer into something approaching a folk hero' (S. Morris, 'The killer who won a nation's sympathy', *Guardian*, 30 October 2001, available at <http://www.theguardian.com/uk/2001/oct/30/tonymartin.ukcrime2>, accessed on 13 August 2013). See also I. Dennis, 'What Should Be Done about the Law of Self-Defence?' [2000] Crim LR 417.

75. O. Bowcott, 'Plan to allow "disproportionate force" against burglars included in crime bill', *Guardian*, 25 November 2012, available at <http://www.theguardian.com/law/2012/nov/25/disproportionate-force-burglars-crime-bill>, accessed 13 August 2012. See also C. Grayling, 'A Tory government would seek to protect the rights of the victim', *Telegraph*, 19 December 2009, available at: <http://www.telegraph.co.uk/news/uknews/law-and-order/6844244/Chris-Grayling-A-Tory-government-would-seek-to-protect-the-rights-of-the-> accessed on 13 August 2013.

76. P. Hennessy and M. Kite, 'Tories back new rights to help homeowners protect themselves from burglars' *Telegraph* 19 December 2009, available at: <http://www.telegraph.co.uk/news/uknews/law-and-order/6844682/Tories-back-new-rights-to-help-home-owners-protect-themselves-from-burglars/> accessed on 29/07/2013.

77. M. Jefferson, 'Householders and the Use of Force against Intruders' (2005) 69 JCL 409.

78. See also, Law Commission, above n. 18 at para. 4.19. See comments the regarding *R v Martin*, above n. 75. 'Mr Martin was entitled to use reasonable force to protect himself and his home, but the jury were surely correct in coming to their judgement that Mr Martin was not acting reasonably in shooting one of the intruders dead and seriously injuring the other': *R v Martin* [2001] EWCA Crim 2245, [2003] QB 1 at [79] and [82], per Lord Woolf CJ.

79. Dennis, above n. 75.

80. F. Leverick, *Killing in Self-Defence* (Oxford University Press: Oxford, 2008) 134.

81. Paul Mendelle QC cited in B. Moore-Bridger, 'Tory change of intruders law "licence to kill"', *London Evening Standard*, 25 January 2010, available at <http://www.standard.co.uk/news/tory-change-of-intruders-law-licence-to-kill-6745373.html>, accessed 13 August 2013.

82. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [66].

83. Katie was also known by the surname 'Gilmore': *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308.
84. *R v Dawes, Hatter and Bowyer* [2013] EWCA Crim 322, [2013] 3 All ER 308 at [39].
85. *Ibid.* at [66].
86. C. Elliott and F. Quinn, *Criminal Law*, 9th edn (Pearson: London, 2012) 371. See also, H. Carter, 'Home owner will not face charges over burglar's stabbing death', *Guardian*, 22 July 2011, available at <http://www.guardian.co.uk/uk/2011/jul/22/stabbed-burglar-death-no-charges>, accessed on 13 August 2013. Cf. *R v Hussain (Tokeer)* [2010] EWCA Crim 94, [2010] 2 Cr App R (S) 60. Others have suggested that the court may ignore the provision in the same way that the Court of Appeal circumvented the sexual infidelity prohibition in *R v Clinton* [2012] EWCA Crim 2.
87. Miller, above n. 39 at 301. 'If an English man should be allowed to kill in defence of his castle, then the aggressive armed burglar can be safely dispatched, but so also can the ten-year-old boy stealing apples from the kitchen': Dennis, above n. 75.
88. Moore-Bridger, above n. 82. Elliott contends that only proportionate force should be regarded as reasonable: C. Elliott 'Interpreting the Contours of Self-defence within the Boundaries of the Rule of Law: The Common Law and Human Rights', Paper presented at the Society of Legal Scholars Annual Conference 2013. Abstract available at <http://archive.legalscholars.ac.uk/edinburgh/abstract.cfm?id=4>, accessed 26 September 2013.
89. Intention to kill or cause grievous bodily harm.
90. M. Wolfkind QC, *The Scotsman*, 'Liberal Tory law could amount to "sponsored revenge"', *The Scotsman*, 24 January 2010, available at <http://www.scotsman.com/news/uk/liberal-tory-law-could-amount-to-sponsored-revenge-1-787152>, accessed on 14 August 2013. It is worth noting here that the 'reasonable force' test has been subjected to similar criticism. For further discussion see, B. Hogan, 'Defence of Force in Protecting Property' [2006] 7 *Theoretical Inquiries in Law* 131 at 151; J. Rozenberg, 'Definition of reasonable force is calculated in each individual case', *Telegraph*, 27 October 2004, available at <http://www.telegraph.co.uk/news/uknews/1475141/Definition-of-reasonable-force-is-calculated-in-each-individual-case.html>, accessed 14 August 2013; Dennis, above n. 75.
91. Shadow Justice Minister Jenny Chapman has criticised the proposal as unnecessary, asserting that the change would add confusion rather than protection because the line between disproportionate and grossly disproportionate is unclear: HC Deb, Public Bill Committee, 5 February 2013, col. 273. '[A] man lay in wait for a burglar on commercial premises, caught him, tied him up, beat him, threw him into a pit and set fire to him. Is that disproportionate, grossly disproportionate?': HC Deb, Public Bill Committee, 5 February 2013, col. 286, available at: <http://www.publications.parliament.uk/pa/cm201213/cmpublic/crimeandcourts/130205/am/130205s01.htm> 276, accessed on 14 August 2013. The Lord Chief Justice noted that the old law on self-defence was clear and sensible (Press Conference, 27 September 2012, Royal Courts of Justice, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/News/Release/lcj-press-conference-270912.pdf>) and the Law Society asserts that the 'change to the law is entirely unnecessary and potentially damaging' (House of Lords Parliamentary Brief, *Crime and Courts Bill*, HL Report Stage, November/December 2012).
92. *R v Faraj* [2007] EWCA Crim 1033.
93. *Ibid.*
94. Criminal Justice and Immigration Act 2008, s. 76. See *R v Owino* [1996] 2 Cr App R 128, [1995] Crim LR 743.
95. See Miller, above n. 39 at 306.
96. *Ibid.*
97. Coroners and Justice Act 2009, s. 54(4).
98. See CPS and ACPO, above n. 28. It is well established that there is a higher rate of murder convictions where a weapon is used. This creates significant problems for the 'abused woman'; S. Edwards, 'Injustice that Puts a Low Price on a Woman's Life' (2003) *The Times Law Supplement* 5. It is submitted, however, that the circumstances of the 'startled householder' deviate from that of the 'abused woman' in that the 'startled householder' will usually be acting in response to a relatively immediate confrontation. Although imminence is not a requirement of the loss of control defence, it is clear that in such circumstances it is likely to be easier to establish a loss of self-control. In contrast, the 'abused woman' may have suffered over a prolonged period of time which may indicate that she made a conscious decision to use a weapon. It is acknowledged that many women do resort to weapons because of the disparity in strength between a woman and her abuser. Of course, there will be cases in which the 'startled householder' is not responding to an immediate confrontation (see, e.g., *R v Martin* [2001] EWCA Crim 2245, [2003] QB 1) and the use of a weapon may indicate that he or she was acting in a considered desire for revenge rather than in response to a loss of self-control (Coroners and Justice Act 2009, s. 54(4)).
99. 'Given that the Lords decided in any event to consider the issue of excessive self-defence, there was no reason for their self-denying ordinance': M. Kaye, 'Excessive Force in Self-defence after *R v Clegg*' (1997) 61 JCL 448 at 451.
100. N. Watt, 'Paratrooper Lee Clegg cleared of last charge over death of teenagers', *Guardian*, 1 February 2000, available

at: <http://www.guardian.co.uk/uk/2000/feb/01/northernireland.nicholaswatt3>, accessed on 14 August 2013.

- [101.](#) O. Bowcott, 'Chris Grayling's self-defence plans greeted with dismay by lawyers', *Guardian*, 9 October 2012, available at: <http://www.guardian.co.uk/politics/2012/oct/09/chris-grayling-self-defence-lawyers>, accessed on 14 August 2013.
- [102.](#) Of course, this example assumes that the imminency requirement is satisfied.
- [103.](#) Wells, above n. 22. See also NSWLCSC, above n. 8; *R v Williams* (1983) 78 Cr App R 276; A. Ashworth *Principles of Criminal Law* (Clarendon Press: Oxford, 1991) 110 *et seq.*
- [104.](#) Self-defence is a justificatory defence requiring that the defendant's conduct is appropriate in the circumstances. See J. Dressler, 'New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking' [1984] 32 *University of California, LA Law Review* 61.
- [105.](#) See McColgan, above n. 34 at 515; Edwards above, n. 99; S. Edwards, 'Abolishing Provocation and Reframing Self-defence--The Law Commission's Options for Reform' [2004] Crim LR 181; See also Law Commission, above n. 18 at para. 4.21.
- [106.](#) S. Edwards, 'Ascribing Intention: The Neglected Role of Modus Operandi--Implications for Gender' (1999/2000) 4(3) *Contemporary Issues in Law* 235.
- [107.](#) Above n. 107; see also *R v McNamara* (1984) 6 Cr App R (S) 356.
- [108.](#) S. Edwards, 'Descent into Murder: Provocation's Stricture--The Prognosis for Women Who Kill Men Who Abuse Them' (2007) 71 JCL 342.
- [109.](#) *Ibid.* See also, Edwards above, n. 106 and n. 107.
- [110.](#) Law Commission, above n. 18 at para. 4.21. See also Wells, above n. 22 at 272.
- [111.](#) Law Commission above n.18 at para. 4.22 (Justice for Women, Vera Baird QC MP, Jane Miller).
- [112.](#) *Ibid.* at para. 4.28.
- [113.](#) Coroners and Justice Act 2009, s. 56(1)(c).
- [114.](#) S. Yeo, 'Killing a Home Invader' (2011) 57 *Criminal Law Quarterly* 181. The home should be the 'ultimate place of safety': D. Drake, 'The Castle Doctrine: An Expanding Right to Stand Your Ground' (2008) 37 *St Mary's Law Journal* 573 at 596. 'There is a special emotional affinity between a person and his home, and it is difficult to imagine normal life in absence of such a "safe harbour" that constitutes an almost indispensable condition for the provision of most basic needs': B. Sangero, *Self-defence in Criminal Law* (Hart Publishing: Oxford, 2006) 267. See also S. Green, 'Castles and Carjacks: Proportionality and the Use of Deadly Force in Defence of Dwellings and Vehicle' [1999] U Ill L Rev 2 at 31.
- [115.](#) See Wells, above n. 22 at 273. 'There must ... be reform to the law on self-defence to enable it to be better used by women who kill in the context of intimate partner violence': New South Wales Domestic Violence Committee Coalition, *New South Wales Option Paper Response*, 8 October 2012) 1. Bleasdale-Hill similarly questioned whether a justifiable distinction can be drawn between the level of acceptable defensive force in the public sphere as opposed to that in the private sphere: L. Bleasdale-Hill 'Justifying the Use of "Grossly Disproportionate Force" in a Place of Residence', Paper presented at the Society of Legal Scholars Annual Conference 2013. Abstract available at <http://archive.legalscholars.ac.uk/edinburgh/abstracts.cfm?id=37>, accessed 26 September 2013.
- [116.](#) C. P. Ewing, 'Psychological Self-Defence: A Proposed Justification for Battered Women' (1990) 14 *Law and Behaviour* 579.
- [117.](#) [1998] AC 147.
- [118.](#) Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person*, Cmnd 7844 (1980). The Criminal Law Revision Committee recommended the introduction into English law of an equivalent partial defence: 'We are of the opinion that where a defendant kills in a situation in which it is reasonable for some force to be used in self-defence but he uses excessive force, he should be liable to be convicted of manslaughter and not murder if, at the time of the act, he honestly believed that the force he used was reasonable in the circumstances. Furthermore, where a person has killed using excessive force in the prevention of crime in a situation in which it is reasonable for some force to be used and at the time of the act he honestly believed that the force he used was reasonable in the circumstances, we consider that he should not be convicted of murder but of manslaughter': Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person*, Cmnd 7844 (1980) para. 288.
- [119.](#) House of Lords Select Committee, *Report on Murder and Life Imprisonment*, HL 78-I (1988-89) para. 89.
- [120.](#) Law Commission, *A New Homicide Act for England and Wales?*, Law Com. Consultation Paper No. 177 (2005).
- [121.](#) See also, Law Commission, above n. 18 at para. 4.17
- [122.](#) 'The householder who responds in fear of physical attack from an intruder and, whom it is said, the present law places in the exquisite dilemma of having to respond "reasonably" or not at all': Law Commission, above n. 18 at para. 4.18.

123. 'The abused child, or adult, who fears further physical abuse at the hands of a serial abuser, who perceives no prospect of escape and who is well aware that there is such a physical mismatch that to respond directly and proportionately to an attack or imminent attack will be futile and dangerous. Such a person, who uses disproportionate force, or who chooses an advantageous moment to strike, is unassisted by the law of self-defence and may only obtain the benefit of a partial defence by distorting their true case, including, sometimes, their mental state, or by the willingness of the courts to distort the law in order to do justice': Law Commission, above n. 18 at para. 4.18.
124. Crimes Act 1900, s. 418, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s418.html, accessed on 14 August 2013.
125. Crimes Act 1900, s. 421(1). This section applies if: '(a) the person uses force that involves the infliction of death, and (b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary: (c) to defend himself or herself or another person, or (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person. (2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter'.
126. Crimes Act 1900, s. 23A, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s23a.html, accessed on 14 August 2013.
127. Crimes Act 1900, s. 23, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s23.html, accessed on 14 August 2013.
128. NSWLCSC, above n. 8 at para. 5.37.
129. Crimes Act 1900, s. 421(2).
130. NSWLCSC, above n. 8 at para. 5.39.
131. 'One of the groups of women who have particular difficulty in running self-defence is the women who kill in what are called non-confrontational circumstances. They have to wait for the offender to be drunk or asleep in order to take action. There will still be a group of women who cannot run self-defence ... [consider] the so-called axe murder case [see *R v R* (1981) 28 SASR 321], the woman who, having learned that her partner had been sexually abusing her children, then he assured her that their family would continue in a similar vein, they would be a happier family and would continue on as they were--which she seems to have taken that the sexual abuse would continue--that case is probably a closer fit with provocation than with self-defence, even with the more expanded understanding of self-defence': NSWLCSC, above n. 8 at para. 5.40.
132. Above n. 132 at para. 9.30.
133. Ibid. at para. 5.60.
134. NSWLCSC, *The Partial Defence of Provocation*, Evidence of the New South Wales Domestic Violence Committee Coalition to the Select Committee, Dr Jane Wangmann (2012) 4, available at <http://www.parliament.nsw.gov.au/provocationcommittee>, accessed on 14 August 2013. See also NSWLCSC, above n. 8 at para. 5.63; K. O'Donovan, 'Law's Knowledge on the Judge, the Expert and the Battered Woman and Her Syndrome' (1993) 20 *Journal of Law and Society* 427.
135. Available at http://www.austlii.edu.au/au/legis/vic/consol_act/ca195882/s9ah.html, accessed 14 August 2013.
136. NSWLCSC, above n. 8 at paras 5.63 and 5.66-5.72; Australian and New South Wales Law Reform Commission Report Summary, *Family Violence: A National Legal Response* (2010), available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/Report%20Summary.pdf>, accessed on 14 August 2013.
137. These elements given further clarification in Crime Act 1958, s. 9AH(4).
138. L. Walker, *The Battered Woman* (Harper and Row: 1979) XV.
139. E. Sheehy, J. Stubbs and J. Tolmie, 'Defending Battered Women on Trial: The Battered Women Syndrome and its limitations' (1992) 16 *Criminal Law Journal* 369. See also Wells, above n. 22 and C. Wells, 'Domestic Violence and Self-Defence' (1990) 140 *New Law Journal* 127.
140. Section 169 of the Crimes Act 1961 (manslaughter by reason of provocation) was abolished by the Crimes (Provocation Repeal) Amendment Act 2009 following the case of *Clayton Robert Weatherston v The Queen* [2011] NZCA 276. For an analysis of the case, see N. Wake, 'Recognising Acute Intoxication as Diminished Responsibility: A Comparative Analysis' (2012) 76 *JCL* 71. See also *Hamidzadeh v R* [2012] NZCA 550 (28 November 2012).
141. *Clayton Robert Weatherston v The Queen* [2011] NZCA 276 at 2.
142. Ibid. at 25.
143. J. Booker, 'Jury finds Weatherston guilty of murder', *New Zealand Herald*, 22 July 2009, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10585763, accessed on 14 August 2013. See also *Hamidzadeh v R* [2012] NZCA 550 (28 November 2012), the first case to consider the impact of provocative words or

conduct on sentencing for murder.

- [144.](#) Booker, above n. 144.
- [145.](#) See Wells, above n. 22.
- [146.](#) Law Commission, *Partial Defences to Murder*, Law Commission Consultation Paper No. 173 (2003). It is worth noting that only 12 consultees stated a preference for extending these options to include defence of property.
- [147.](#) Ibid.
- [148.](#) The case of *Clegg* is particularly problematic because the force used was deemed excessive and the threat had already subsided by the time the fourth shot was fired. In this regard, excessive self-defence *per se* would not necessarily result in a reduction of murder to manslaughter. For this reason, social framework evidence is critical in assessing culpability (*R v Clegg* [1995] 1 AC 482, HL).
- [149.](#) Note that excessive self-defence in New South Wales is currently unavailable where the defendant kills in defence of property, criminal trespass to land or when arresting an offender (NSWLCSC, above n. 8). The Lord Chief Justice has denounced s. 43 of the Crime and Courts Act 2013 as 'a very bad example of where statutory interference with the common law is wholly unnecessary': HL Deb, 10 December 2012, vol. 741, col. 885. The Director of Public Prosecutions has similarly asserted that the old law on self-defence afforded householders a great deal of protection and worked very well: House of Commons, Public Bill Committee, 5 February 2013, col. 272, available at: <http://www.publications.parliament.uk/pa/cm201213/cmpublic/crimeandcourts/130205/am/130205s01.htm>, accessed on 14 August 2013. There is concern that the provision may operate as a charter for vigilantes and encourage intruders to arm themselves.
- [150.](#) See Law Commission, above n. 147.
- [151.](#) See McColgan, above n. 34 at 520.
- [152.](#) See Edwards, above n. 99 at 5.
- [153.](#) See McColgan, above n. 34 at 515.
- [154.](#) See Wells, above n. 22 at 275.
- [155.](#) NSWLCSC, Evidence of the New South Wales Domestic Violence Committee Coalition to the Select Committee, Dr Jane Wangmann, above n. 135.

Publication (ix)

“‘His home is his castle. And mine is a cage’: A New Partial Defence for Primary Victims Who Kill’ (2015) *Northern Ireland Legal Quarterly* 66(2) 151-77.

‘His home is his castle. And mine is a cage’:¹ a new partial defence for primary victims who kill

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She said ‘I’m savin’ up my money and when I get the nerve I’ll run
But Jim don’t give up easily so I intend to buy a gun
He will never see the way he treats me is a crime
Somebody oughta lock him up but I’m the one ‘Who’s done the time’³

Abstract

This article provides an in-depth analysis of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 which had the effect of repealing the Australian state of Victoria’s only general ‘partial defence’ of defensive homicide, and replaced the existing statutory self-defence in murder/manslaughter provisions and general common law self-defence rules with a single test. The abolition of defensive homicide means there is now no general ‘partial defence’ to accommodate cases falling short of self-defence. The change is likely to mean that some primary victims will find themselves bereft of a defence. This is the experience in New Zealand where the Family Violence Death Review Committee recently recommended the reintroduction of a partial defence, post-abolition of provocation in 2009. Primary victims in New Zealand are being convicted of murder and sentences are double those issued pre-2009. Both jurisdictions require that a new partial defence be introduced, and accordingly, an entirely new defence predicated on a fear of serious violence and several threshold filter mechanisms designed to accommodate the circumstances of primary victims is advanced herein. The proposed framework draws upon earlier recommendations of the Law Commission for England and Wales, and a comprehensive review of the operation of ss 54 and 55 of the Coroners and Justice Act 2009, but the novel framework rejects the paradoxical loss of self-control requirement and sexed normative standard operating within that jurisdiction. The recommendations are complemented by social framework evidence and mandatory jury directions, modelled on the law in Victoria. A novel interlocutory appeal procedure designed to prevent unnecessary appellate court litigation is also outlined. This bespoke model provides an appropriate via media and optimal solution to the problems faced by primary victims in Victoria and New Zealand.

1 Ariel Catén, ‘A Man’s Home Is His Castle’ (lyrics) on Faith Hill’s album, *It Matters To Me* (1995).

2 I am incredibly grateful to Professor Warren Brookbanks (University of Auckland, New Zealand), Associate Professor Thomas Crofts (University of Sydney, Australia), Ben Livings (Senior Lecturer, University of New England, Australia), Associate Professor Arlie Loughnan (University of Sydney, Australia) and Professor Alan Reed (Associate Dean for Research and Innovation, Northumbria University) for their very helpful comments on earlier drafts of this article. Elements of this paper were presented to the Sydney Law School, Institute of Criminology (Nicola Wake, ‘Extreme Provocation and Loss of Control: Comparative Perspectives’ 18 March 2015). I thank members of the institute for their thoughtful contributions on that presentation. Any errors or omissions remain my own.

3 Catén (n 1).

Introduction

The Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (the 2014 Act) abolished the Australian state of Victoria's only general 'partial defence'⁴ of defensive homicide and replaced the existing statutory self-defence in murder/manslaughter provisions and general common law self-defence rules with a single test.⁵ In the absence of a partial defence, self-defence becomes an all-or-nothing claim, where a successful plea results in an outright acquittal, and an unsuccessful plea results in conviction for the offence charged. The 2014 Act also expanded the admissibility of social framework evidence (which includes, inter alia, the history of the relationship, cumulative impact of family violence, and social, economic and cultural factors that may impact on a family member) from homicide to all self-defence cases.⁶ These amendments were complemented by the introduction of new juror directions in cases involving family violence.⁷ Despite the aims of the Victorian Department of Justice (VDoJ), this 'one-size-fits-all' approach to self-defence may have unintended consequences in practice, with significant ramifications in intimate partner homicide cases.⁸

This article commends the amendments to self-defence, but the impact of these reforms 'should not be overstated'.⁹ The existence of a partial defence is necessary to capture cases that fall outside the scope of self-defence, but do not warrant the murder label.¹⁰ The evaluation undertaken by jurors in determining whether a partial defence applies can serve an important role in assessing societal opinion of the killing, thereby assisting the sentencing judge in imposing sentence.¹¹ It also has the effect of involving

4 The conviction was actually for defensive homicide, rather than a reduction from murder to manslaughter (although the effect was to substitute a murder conviction with the lesser offence); the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, s 3(4).

5 Ss 322N and 322K of the 2014 Act abolished common law (s 322N) and statutory versions of self-defence (Crimes (Homicide) Act 1958, ss 9AC (self-defence in murder cases) and 9AE (self-defence in manslaughter cases)).

6 Crimes Act 1958, s 322J, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014. For a detailed exposition of the relational nature of domestic violence, see Thom Brooks, *Punishment* (Routledge, 2012) ch 10.

7 Jury Directions Act 2013, ss 31 and 32, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 4.

8 This article takes as its main focus cases of female on male intimate partner homicide, addressing the potential impact of the absence of an applicable partial defence. It should be noted, however, that the impact is relevant to both male and female defendants, both of whom may suffer from domestic abuse. The feminine pronoun will also be used throughout this article when referring to the primary victim, but this should not be interpreted as implying that only women may be considered the primary victim, nor should it be read as implying that the partial defence(s) are gender-specific. For a definition of the term 'primary victim', see page 153 below. For an excellent analysis of defensive homicide cases involving male defendants see, Kellie Toole, 'Self-defence and the Reasonable Woman: Equality before the New Victorian Law' [2012] 36 Monash University Law Review 250.

9 Hansard, Legislative Council, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, 7 August 2014, Ms Pennicuik (Southern Metropolitan) 2419 citing Debbie Kirkwood, Mandy McKenzie, Libby Eltringham, Danielle Tyson, Bronwyn Naylor, Chris Atmore and Sarah Capper, 'Submission on the Department of Justice's Defensive Homicide: Proposals for Legislative Reform-Consultation Paper' (2013).

10 For a detailed analysis of potential partial defences, see Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access to Defences for Women who Kill their Abusers' (2013) 39 Monash University Law Review 864.

11 See, generally, Family Violence Death Review Committee (FVDR), *Fourth Annual Report* (2014).

jurors in an important 'dialogue with the legislature and prosecutors'.¹² A comparative analysis with the position in New Zealand demonstrates that primary victims are being convicted of murder and sentenced more harshly than if a partial defence was available. The Family Violence Death Review Committee (FVDRC) defines the primary victim as an individual experiencing 'ongoing coercive and controlling behaviour from their intimate partner'. The predominant aggressor is the principal aggressor in the relationship who 'has a pattern of using violence to exercise coercive control'.¹³ These terms will be used throughout this article. New Zealand has a restrictive sentencing regime and tighter self-defence provision than Victoria, but these differences do not detract from the unfairness in labelling the primary victim a murderer.¹⁴ As Quick and Wells point out, evading the stigmatic murder label is often as important to primary victims as the sentence imposed.¹⁵

It is essential that Victoria and New Zealand adopt a more nuanced approach to reforming homicide defences. The introduction of a bespoke partial defence or offence predicated on a fear of serious violence provides a novel *via media* and optimal solution to the problems faced by primary victims within Victoria and New Zealand. These innovative proposals draw upon earlier recommendations of the Law Commission for England and Wales, in addition to an in-depth review of the operation of ss 54 and 55 of the Coroners and Justice Act 2009 (the 2009 Act), as enacted.¹⁶ The entirely new partial defence would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious violence from the victim against the defendant or another identified individual.¹⁷ The defence is qualified by appropriate threshold filter mechanisms designed to preclude the availability of the defence in unmeritorious cases. These clauses include a 'normal person' test and provisions stipulating that the defence is not available where the defendant intentionally incited serious violence, acted in a considered desire for revenge or on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.¹⁸ In cases where sufficient evidence is raised that the partial defence might apply, it is then for the prosecution to disprove the defence to the usual criminal standard. The defence is complemented by bespoke provisions on social framework evidence and *mandatory* juror directions where family violence is in issue. A new interlocutory appeal procedure that would serve to prevent unnecessary appellate court litigation is also advanced. The following analysis demonstrates not only the need for such a partial defence within Victoria and New Zealand, but also the extent to which this newly proposed model provides an advantageous framework for reform.

12 Mike Redmayne, 'Theorising Jury Reform' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial* vol II (Hart 2006) 102, cited in Thomas Crofts, 'Two Degrees of Murder: Homicide Law Reform in England and Western Australia' (2008) 8(2) Oxford University Commonwealth Law Journal 187–210, 198.

13 FVDRC (n 11) 6. These terms are useful in that they are gender-neutral but, as Hamer identifies, they could not be used in a forensic context. My thanks to Associate Professor David Hamer (University of Sydney) for making this point. See also n 8 above on use of the feminine pronoun in this article.

14 For detailed discussion on the abolition of provocation and the restrictive sentencing regime operating in New Zealand, see Warren Brookbanks, 'Partial Defences to Murder in New Zealand' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2011) 271–90.

15 Oliver Quick and Celia Wells, 'Getting Tough with Defences' [2006] Criminal Law Review 514. See also Crofts and Tyson (n 10).

16 Law Commission, *Partial Defences to Murder* (Law Com No 290 2004); Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304 2006).

17 Coroners and Justice Act 2009, s 54(3).

18 Ibid s 54(5)–(6).

The decision to abolish partial defences in Victoria

In 2005, defensive homicide replaced provocation in a move intended to send a clear message that killings borne of male possessiveness, envy and rage were unacceptable.¹⁹ The Victorian Law Reform Commission (VLRC) recommended abolition at a time when the Court of Appeal was considering the case of *Ramage*.²⁰ Ramage claimed he had lost control and killed his estranged wife, Julie, when she asserted that sex with him 'repulsed her', and said she was happy with another man.²¹ In a 'dramatic' display of 'victim blaming' the trial became 'an examination, and ultimately crucifixion' of Julie, where her new relationship, marital unhappiness and comments regarding her life without Ramage were closely scrutinised.²² Julie was unhappy as a result of Ramage's controlling and oppressive behaviour and the violence he inflicted on her, but a significant amount of abuse evidence was excluded on grounds that it was temporally too remote and/or 'potentially highly prejudicial'.²³ Morgan's observation that 'dead women tell no tales, tales are told about them' is a remarkably apt epithet of the case.²⁴ Convicted of manslaughter, Ramage was sentenced to 11 years' imprisonment, but released after a minimum non-parole period of 8 years. Following sentence, Julie's sister expressed her disappointment, noting that a murder conviction would have resulted in a higher sentence.²⁵ The recommendations of the VLRC, coupled with public outrage regarding the decision reached in *Ramage*, influenced the abolition of the partial defence.²⁶

In the absence of provocation, the VLRC considered a new partial defence of excessive self-defence necessary to accommodate killings in response to domestic abuse, should self-defence fail.²⁷ The government responded by introducing defensive homicide. Designed to apply to 'understandable over-reaction' scenarios, murder could be reduced to defensive homicide where the defendant killed believing it necessary to defend herself/another, but reasonable grounds for that belief were absent.²⁸ The test asked jurors to assess whether the defendant believed her conduct was necessary to defend herself/another from death or really serious injury. If jurors concluded the defendant held that belief, or the prosecution failed to disprove that beyond reasonable doubt, the defendant would be acquitted of murder, and jurors were required to determine her liability for defensive homicide. The defendant would be guilty where the prosecution proved beyond reasonable doubt the defendant had no reasonable grounds for the belief.²⁹

The repeated use of defensive homicide in cases involving one-off violent confrontations between men of comparable strength meant that defensive homicide might

19 VLRC, *Defences to Homicide: Final Report* (2004) (comments on provocation). Note, the VLRC recommended the introduction of excessive self-defence, not defensive homicide.

20 Ibid; *Ramage* [2004] VSC 508 [22] (Osborn J).

21 *Ramage* (n 20) [40] (Osborn J).

22 Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' [2006] 18(1) *Current Issues in Criminal Justice* 51, 54. See also, Phil Cleary, *Getting Away with Murder: The True Story of Julie Ramage's Death* (Allen & Unwin 2005) 136.

23 *Ramage* [2004] VSC 391 [46] (Osborn J).

24 Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them' (1997) *Melbourne University Law Review* 237.

25 AAP, 'Provoked Wife Killer Gets 11 Years' *Sydney Morning Herald* (Sydney 2004).

26 Ibid.

27 VLRC (n 19) 102.

28 Ibid para 3.101, citing Supplementary Submission 27 (Criminal Bar Association).

29 Ibid 12–13.

be perceived to have failed to produce the results intended.³⁰ The offence was criticised as inherently complex, difficult to apply, and lacking common sense.³¹ It had the effect of diverting attention away from the (in)adequacy of self-defence. Popular opinion was heavily influenced by evocative media reports, lamenting deals that could ‘get potential murderers off the hook’, and advocating ‘a stronger voice for crime victims’.³² Men who ‘escaped’ potential murder convictions include: Dambitis,³³ who killed his victim with lumps of wood and his fists two days after being released from prison; Giammona,³⁴ who stabbed another prison inmate 16 times; a schizophrenic man who killed two men believing he was the clone of Hitler or Hitler’s grandson;³⁵ Smith,³⁶ who, in a drug-induced psychosis, stabbed his victim 50 to 60 times because he allegedly called him gay and threatened him; and a drug addict, with 91 previous convictions, who killed his victim during the course of a drug-related robbery.³⁷

Between 2005 and 2014, there were 33 convictions for defensive homicide in Victoria: 28 out of 33 were of men; 32 out of the 33 victims were men; and 27 out of the 28 men killed another man; meaning that only five women were convicted of the offence.³⁸ It was the case of *Middendorp*,³⁹ together with a comprehensive review produced by the VDoJ, which operated as a catalyst for abolition. Middendorp was convicted of defensive homicide after he brutally stabbed his estranged partner, Jade, to death because she attempted to bring a male friend into their home. According to Middendorp, Jade threatened him with a knife and, because of earlier violence, he believed he needed to defend himself from death or serious injury. The relationship was plagued by alcohol and physical abuse. Earlier reports by Jade indicated that Middendorp was responsible for the violence, but Middendorp blamed Jade, and her reliability was questioned at trial, where she was obviously unable to defend herself.⁴⁰ Like Julie Ramage, it was Jade who was put on trial when she was described as ‘a troubled young woman’ who deserved the ‘prospect of growing out of her [drug and alcohol] addiction’.⁴¹ At the time of the killing, Middendorp was subject to bail conditions and a family violence intervention order as a result of several alleged offences against Jade.⁴² Middendorp was described as over 6 feet tall and 90kg,

30 VDoJ, *Defensive Homicide: Review of the Offence of Defensive Homicide* (VDoJ Discussion Paper 2010) 36.

31 VDoJ, *Defensive Homicide: Proposals for Legislative Reform* (VDoJ Consultation Paper 2013). See also, Adrian Lowe, ‘New Calls for State to Overhaul Homicide Laws’ (2010) *The Age* 6; and, Geoff Wilkinson and Courtney Crane, ‘A Law Meant to Protect Women Is Being Abused by Brutal Men’ *Herald Sun* (Melbourne 2012) citing Kate Fitz-Gibbon and Sharon Pickering.

32 Michael, ‘Deals Could Get Potential Murderers off the Hook in Victoria’ *Herald Sun* (Melbourne 2012); Robert Clark, ‘Giving a Stronger Voice to Crime Victims’ *Herald Sun* Law Blog (Melbourne 2012).

33 [2013] VSCA 329.

34 [2008] VSC 376.

35 *Ball* [2014] VSC 669.

36 [2008] VSC 617 [9].

37 *Taiba* [2008] VSC 589. See, generally, Matt Johnson, ‘Killer Blow: Defensive Homicide Laws Hijacked by Thugs Will Be Scrapped’ *Herald Sun* (Melbourne 2014).

38 Hansard, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, 3 September 2014, Mr McCurdy, Murray Valley, 3144. For a contextual analysis of these figures see, DVRCV, *Justice or Judgement? The Impact of Victorian Homicide Law Reforms on Responses to Women Who Kill Intimate Partners* (DVRCV Discussion Paper No 9 2013).

39 [2010] VSC 202.

40 *Ibid* [7].

41 *Ibid* [17].

42 *Ibid* [4].

compared to Jade who was smaller and weighed approximately 50kg.⁴³ Middendorp wrestled the knife from Jade and stabbed her four times in the shoulder before she managed to stagger from the house. Witnesses observed Middendorp follow her, shouting, 'she got what she deserved', and calling her 'a filthy slut'.⁴⁴

The facts in *Middendorp* bore the hallmarks of a brutal killing borne out of anger, sexual jealousy and male possessiveness. Middendorp was sentenced to 12 years' imprisonment with a minimum non-parole period of 8 years. The verdict was vituperatively criticised as 'laughable', 'too lenient', 'unsatisfactory' and 'all about provocation'.⁴⁵ There was widespread concern that the precedent might result in similar verdicts in other femicide cases. The case coincided with the VDoJ's review which concluded that the offence had been inappropriately used as a vehicle to drive provocation-type arguments; the (unclear) benefit to having defensive homicide for primary victims was substantially outweighed by the expense of inappropriately excusing men who kill; and the shift in emphasis from self-defence to defensive homicide implied that the primary victim's response was irrational rather than reasonable in the circumstances.⁴⁶ Shortly thereafter, the offence was abolished by the 2014 Act.

The decision to abolish defensive homicide was not unanimously supported. Indeed, a number of eminent scholars have advocated that reform should have focused upon plea-bargaining practice in Victoria, rather than the relatively embryonic operation of defensive homicide.⁴⁷ *Middendorp* is one of a limited number of defensive homicide convictions reached by jury verdict. In this respect, it is apparent that any partial defence needs to be framed in order to ensure that it is left to the jury in appropriate cases. The vast majority of defensive homicide convictions were achieved via plea bargains, mandating that the Crown withdraw related homicide charges.⁴⁸ Although plea-bargaining is an expeditious and financially beneficial way of obtaining a conviction, the lack of transparency associated with this prosecutorial discretion circumvents juror – and therefore social – evaluation as to whether an individual should be convicted of murder or manslaughter. It also prevents effective analysis of the reasons for accepting such pleas.⁴⁹ This lack of transparency fuelled 'public perceptions of clandestine outcomes, inequality and a lack of accountability' in relation to the application of defensive homicide.⁵⁰

43 *Middendorp* [10].

44 *Ibid* [9].

45 Adrian Howe, 'Another Name for Murder' (2010) *The Age*; Kate Fitz-Gibbon, 'Defensive Homicide Law Akin to Getting Away with Murder' *The Australian* (Sydney 2012). Middendorp's subsequent appeal against conviction and sentence was unanimously dismissed; *Middendorp* [2012] VSCA 47.

46 VDoJ (n 31) viii–ix, and 27–8.

47 Kirkwood et al (n 9).

48 Hansard, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, 3 September 2014, Mr Pakula (Lyndhurst), 3135.

49 Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post-Law Reform' (2011) 35 *Melbourne University Law Review* 905. See also, Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan 2014).

50 Flynn and Fitz-Gibbon (n 49) 907. Flynn and Fitz-Gibbon suggest that best practice guidelines modelled on the Attorney General's 'Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise' framework operating in England and Wales would assist in improving transparency, thereby ensuring that pleas are accepted only in appropriate cases. See also, Kirkwood et al (n 9) 8, and Debbie Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge 2013).

Amendments to self-defence: attempting to compensate for the lack of a partial defence?

The prospect of having no partial defence for primary victims highlighted the need to improve the law on self-defence and evidence admissibility. The 2014 Act replaced the existing statutory self-defence provisions relating to murder/manslaughter⁵¹ and the general common law self-defence rules with a single test.⁵² Self-defence represents an 'all-or-nothing' claim, where a successful plea results in an outright acquittal, and an unsuccessful plea results in conviction for the offence charged. This effectively mirrors the law of England and Wales.⁵³ The test requires that the defendant believed force was necessary in self-defence and the conduct was reasonable in the circumstances as perceived by the defendant.⁵⁴ The introduction of s 322M of the 2014 Act implies that self-defence may be more accessible to primary victims in Victoria than it currently is in England and Wales. Section 322M specifies that, in cases involving family violence, self-defence may apply even where the threat is not imminent, or the force used is excessive.⁵⁵ The assumption is that reformulated self-defence will capture deserving cases, while other cases where self-defence is unsuccessfully raised will be considered during sentencing.⁵⁶ In murder cases, s 322K(3) requires that the defendant believed the conduct was necessary in order to defend herself/another from death or really serious injury. Section 322L further precludes the availability of the defence where the victim's conduct is lawful, and the defendant knows that the conduct is lawful at the time.⁵⁷

The emphasis on family violence under s 322M challenges the stereotypical notion of self-defence as a one-off confrontation between two individuals of equal strength. It reflects contemporary recognition that a more nuanced approach must be adopted in cases where the primary victim wards off a physically stronger aggressor in a non-traditional self-defence situation. Ramsey heralded the Victorian provisions on self-defence as a radical and trendsetting example of feminist-inspired reform.⁵⁸ The cases of *SB*, in which a *nolle prosequi* was entered, and *Dimotrovski*, which resulted in a magistrates' discharge, have been 'cautiously' cited as evidence that earlier amendments to self-defence are working in practice.⁵⁹ Yet, the assumption that these cases demonstrate success of the new provisions 'may be premature'.⁶⁰ *SB* shot her stepfather after he demanded oral sex from her at gunpoint. *Dimotrovski* stabbed her husband after he hit her in the face, pushed her to the

51 See n 5.

52 Ibid.

53 Criminal Justice and Immigration Act 2008, s 76.

54 Crimes Act 1958 (Vic), s 322K, as amended by the Crimes (Abolition of Defensive Homicide) Act 2014.

55 This effectively re-enacts and expands the scope of s 9AH of the Crimes (Homicide) Act 2005 (the 2005 Act) beyond homicide cases. It should be noted that a lack of imminence will not necessarily bar a successful self-defence claim in England and Wales; *Attorney General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105 (HL). Nor does the defendant have to 'weigh to a nicety the exact measure of his defensive action'; *Palmer* [1971] AC 814; Criminal Justice and Immigration Act 2008, s 76(7).

56 See Crofts and Tyson (n 10) 865.

57 This effectively replicates s 9AF of the 2005 Act (now repealed).

58 Carolyn Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform' (2010) 100(1) *Journal of Criminal Law and Criminology* 32–108 (commenting on earlier amendments to self-defence under the 2005 Act).

59 See, Crofts and Tyson (n 10) 884.

60 Toole (n 8) 270.

ground and attacked their daughter.⁶¹ These cases did not proceed to trial because it was recognised that both defendants were acting in self-defence; their actions complied with 'traditional notions of self-defence'.⁶² The problems presented by judicially invented constructs of imminence and proportionality were not at issue.⁶³

Even with bespoke provisions dedicated to the unique circumstances of family violence, some primary victims may find themselves bereft of a defence in homicide cases. Abolition of both provocation and defensive homicide renders self-defence 'an all or nothing roll of the dice for women in these circumstances, and if they are unable to convince the court that self-defence has been made out, then what these women will face is conviction for murder'.⁶⁴ Despite the problems associated with defensive homicide, a number of legal practitioners, academics and key stakeholders identified that abolition would be a 'retrograde step'.⁶⁵ 'Introduced for sound reasons', defensive homicide provided 'a very important and compelling safety net for women who experience, and respond to family violence';⁶⁶ removal of that safety net on grounds that men have been inappropriately using it, in male-on-male combat, unfairly disadvantages primary victims.⁶⁷

Five women were convicted of defensive homicide, all of whom might have faced a murder conviction had the offence been abolished.⁶⁸ One of the most recent female-on-male defensive homicide convictions did not involve family violence or a relationship between the defendant and victim. Copeland,⁶⁹ a 24-year-old heroin addict and prostitute, stabbed her 68-year-old client in the back and left, taking \$420 from his wallet. According to Copeland, she feared that she would be raped or killed when he threatened her with a knife during an argument regarding payment. It was 'quite impossible' to tell exactly what happened, but had the evidence supported Copeland's version of events, self-defence would have been available.⁷⁰ The media labelled Copeland a 'drug addled prostitute',⁷¹ and the sentencing judge was unsympathetic towards the mental illness from which she suffered. Maxwell J noted that there was 'no particular feature of Copeland's drug dependency which made it peculiarly or unusually intractable'.⁷²

Copeland is clearly very different from the other female defensive homicide convictions that have involved significant history of abuse in intimate partner relationships. Consideration of a defendant's recognised medical condition would require the

61 See, Kim Stevens, 'Breakthrough Case – Dismissed Murder Charge Defence Successful under New Laws' *Shepparton News* (Shepparton 8 May 2009) 3, cited in VDoJ (n 30) 31–2, paras 108–9.

62 Danielle Tyson, Sarah Capper and Debbie Kirkwood, 'Submission to Victorian Department of Justice, Review of the Offence of Defensive Homicide' (2010) 8.

63 Toole (n 8) 270.

64 Ramsey (n 58). See also, Caroline Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14(1) *Journal of Gender, Social Policy and the Law* 27–71. Hansard (n 38) Mr Pakula (Lyndhurst) 3137.

65 Hansard (n 38) Ms Graley (Narre Warren South) 3146, citing Mary Crooks and Sarah Capper of the Victorian Women's Trust.

66 Kirkwood et al (n 9) 1.

67 Ibid 8. See also, VDoJ (n 30) viii, ix and 29.

68 DVRCV, *Defensive Homicide an Essential Safety Net for Victims* (DVRCV 2014). See, *Williams* [2014] VSC 304; *Copeland* [2014] VSC 39 (11 February 2014); *Edwards* [2012] VSC 138; *Creamer* [2011] VSC 196; and *Black* [2011] VSC 152.

69 *Copeland* (n 68).

70 Ibid.

71 Mark Russell, 'Drug-addled Prostitute Jailed for Kitchen Knife Killing' (2014) *The Age*.

72 *Copeland* (n 68) [65].

introduction of a new partial defence equivalent to s 2 of the Homicide Act 1957, as amended, and not one predicated on a fear of serious violence.⁷³ It might be appropriate to consider a defendant’s recognised medical condition as part of the circumstances of the individual case where he/she fears serious violence, considered further below.⁷⁴ The remaining defensive homicide convictions of primary victims illustrate the need for a partial defence based upon a fear of serious violence.

It has been suggested that the availability of defensive homicide, or an alternative partial defence, may result in defendants pleading guilty to a lesser offence rather than risk a murder conviction in claiming self-defence. It is also possible that a halfway house potentially encourages compromise manslaughter verdicts based upon an ostensible disproportionate use of force, for example, where a primary victim uses a weapon to kill an aggressor.⁷⁵ The case of *Edwards*⁷⁶ reflects circumstances in which the availability of defensive homicide may have prevented a successful self-defence claim. According to Edwards, the predominant aggressor threatened her life and repeatedly punched and kicked her in the days preceding the fatal attack. Edwards said:

I went to sleep for while, and I was hoping that it all would be over when I woke up. And when I woke up, he was still drunk . . . and then . . . he said that he was going to cut my eyes out and cut my ears off. And disfigure me. And then he said he was going to get some petrol from out the back and he was going to set me on fire and ruin my pretty face so that no one would look at me ever again. And I panicked.⁷⁷

‘Wild and angry’, the predominant aggressor approached Edwards brandishing a knife. During the struggle that ensued, he lost his balance and fell. Edwards then grabbed the knife and stabbed him. It was accepted that Edwards believed it was necessary to defend herself, but her plea meant she accepted there were ‘no reasonable grounds’ to believe she was in ‘danger of death or serious injury’. The wounds inflicted were ‘a disproportionate response to the threat’.⁷⁸ The reforms might assist primary victims like Edwards to claim self-defence, but there is ‘little evidence to suggest that self-defence would become more accessible’.⁷⁹ The prosecution case, in stark contrast to Edwards’ version of events, was that she stabbed her sleeping husband. In this respect, there was (and remains) a risk that jurors might reject self-defence. In the absence of a partial defence, defendants like Edwards might be convicted of murder. There is no guarantee that the absence of a partial defence will prevent primary victims from pleading ‘guilty to murder in order to receive a discounted sentence’ in such cases. Of course, the bargaining power of defence counsel will be substantially reduced in the absence of a partial defence.⁸⁰

73 The VLRC (n 19) 243 opposed the introduction of diminished responsibility, preferring that mental conditions that do not meet the requirements of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), ss 20–5, are considered as part of mitigation during sentencing. For an analysis of the challenges in applying a defence in the context of co-morbidity see, Arlie Loughnan and Nicola Wake, ‘Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication’ in Alan Reed and Michael Bohlander with Nicola Wake and Emma Smith (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014) ch 8.

74 See generally *Asmelash* [2013] All ER (D) 268.

75 VLRC (n 19) para 3.92. See also, Crofts and Tyson (n 10) 887.

76 *Edwards* (n 68).

77 Ibid [28].

78 Ibid [49].

79 Kirkwood et al (n 9) 5.

80 Ibid 5.

Designed to accommodate the circumstances of primary victims, s 322M specifies that, where family violence is in issue, a person may believe that conduct is necessary, and the response may be reasonable in the circumstances as perceived by them, even if the person is responding to harm that is not immediate, or the response involves the use of force in excess of the threatened or inflicted harm. Priest has criticised the provision as a 'breathhtaking extension' of self-defence:

Taken to their logical (or, perhaps, their illogical) conclusion, these new provisions suggest that a number of 'trivial' acts of 'harassment' (whatever the term might embrace) by a family member, which do not involve actual or threatened abuse, might permit a person to use disproportionate force to kill that family member even where 'harm' is not 'immediate'.⁸¹

As Priest identifies, s 322M appears to imply a different approach in family violence cases. This might have unintended consequences for defendants who find themselves in a potentially analogous situation to vulnerable family members, but for failing to fall within that category. For example, in the context of terrorist/hostage, human trafficking, or other situations where 'the threat is not immediate, but . . . more remote in time' or, arguably, ongoing.⁸² In such situations 'there may not be a need to prevent immediate harm but rather an immediate need to act to prevent inevitable harm'.⁸³ The Judicial College of Victoria, however, has suggested that the common law approach regarding immediacy and the reasonableness of the force used will continue to apply.⁸⁴ In practice, the provision reiterates the common law principle that when acting in the 'agony of the moment' the defendant does not need to 'weigh to a nicety the exact measure of his necessary defensive action'.⁸⁵ A similar clause recommended by the VLRC would have been of general application.⁸⁶ The VLRC proposal extended necessity in self-defence to cases where the defendant 'fears inevitable, rather than immediate harm'. The provision was intended to clarify the common law position that the significance of the defendant's 'perception of danger is not its imminence. It is that it renders the defendant's use of force really necessary'.⁸⁷ In this respect, whether the defendant/victim is a family member and/or family violence is in issue would be more appropriately categorised as a matter of evidence rather than a principle of law.⁸⁸ The effect would be to extend s 322M to all self-defence cases.

81 P Priest, 'Defences to Homicide' (2005) 8 cited in Australian Law Reform Commission, *Family Violence: A National Legal Response* (Australian Law Reform Commission No 114 2010).

82 VLRC (n 19) para 3.61.

83 Ibid para 3.54.

84 Judicial College of Victoria, *Bench Notes: Statutory Self-Defence* (Judicial College of Victoria 2014).

85 Keane [2010] EWCA Crim 2514 [3].

86 For example, 'where a young man, who kills defending himself against someone who is physically much stronger and in genuine fear for his life, uses a level of force which may at first appear to be excessive'; VLRC (n 19) 84.

87 'If the captor tells [the defendant] that he will kill her in three days' time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until the third day? I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by [the deceased] that night except by killing him first was reasonable'; *Lavellee* [1990] 1 SCR 852, 899 (Wilson J). See, generally, VLRC (n 19) 81.

88 See, *Zecovic* (Vic) (1987) 162 CLR 645, 622 (commenting upon the dangers of elevating matters of evidence to substantive legal principles).

It is important to note that s 322M does not apply only to abused women, but extends to other family members. The 2014 Act defines ‘family member’ and ‘family violence’ in wide terms in order that ‘a fairly broad cohort of persons and circumstances’ may be brought within the new test.⁸⁹ The term family member covers current and former marital relationships; intimate personal relationships; parental relationships (step or biological); guardians; a child in residence; and a person who is or has been a member of the household. The definition of family violence includes, *inter alia*, physical, psychological and sexual abuse, which may manifest as a single act, or several acts amounting to a pattern of behaviour.⁹⁰ It is apparent that the broad ambit of this element of the defence may have unintended consequences in practice.

However, the extent to which s 322M will change the substantive approach is questionable. A provision similar to s 322M was introduced in England and Wales in relation to the use of force by householders.⁹¹ Where a defendant is protecting herself/another against a trespasser, force will only be regarded as unreasonable if it is ‘grossly disproportionate’. Herring points out that s 43 makes ‘little change to the law because the jury would, even under the standard approach, take into account the emergency of the moment when considering whether a householder was acting reasonably and would be likely to only find a grossly disproportionate amount of force to be unreasonable’.⁹² The clause has been heavily criticised as a ‘triumph of rhetoric over reason’ and it highlights the dangers associated with enacting legislation specific to discrete categories of offender that may do little to change the substantive approach.⁹³ The primary victim might face similar problems. As Hollingworth J identified in *Williams*:⁹⁴

what happens in such cases is that the victim of family violence finally reaches a point of explosive violence, in response to yet another episode of being attacked. In such a case, it is not uncommon for the accused to inflict violence that is completely disproportionate to the immediate harm or threatened harm from the deceased.⁹⁵

A woman is more likely to use a weapon, and it is not uncommon for substantially more strikes to be inflicted than may have objectively been reasonable to incapacitate a man.⁹⁶ Hollingworth J acknowledged that viewing the infliction of 16 blows with an axe in response to a minor or trivial threat as being a very serious example of an offence might not be the right conclusion where the defendant has suffered a history of abuse.⁹⁷ This implies that greater weight will be attached to the impact of family violence during sentencing, but such a defendant might still be convicted of murder. In cases involving excess force, an appropriate partial defence is an essential safety net for primary victims.

⁸⁹ Hansard (n 38) Mr Morris (Mornington) 3135.

⁹⁰ Crimes Act 1958, s 322J(2) and (3), as amended by the Crimes Amendment (Defensive Homicide) Act 2014 (Vic).

⁹¹ Criminal Justice and Immigration Act 2008, s 76(5A), as amended by the Crime and Courts Act 2013, s 43.

⁹² Jonathan Herring, *Criminal Law: Texts, Cases and Materials* (OUP 2014) 646.

⁹³ Vivien Cochrane, ‘Allowing Disproportionate Force in Self-defence – A Triumph of Rhetoric over Reason’ (Kingsley Napley Criminal Law Blog 9 May 2013). See also, Claire De Than and Jesse Elvin, ‘Mistaken Private Defence: The Case for Reform’ in Reed et al (n 73) 139.

⁹⁴ *Williams* (n 68).

⁹⁵ *Ibid* [35]–[36].

⁹⁶ *Ibid* [34].

⁹⁷ *Ibid* [33]–[36].

The amendments to self-defence are complemented by new jury directions designed to assist jurors to understand the impact of abuse, and how this can evoke ‘possibly the worst behaviour from everybody in an unbelievably hot-tempered, violent home where domestic family violence is prevalent’.⁹⁸ By requiring the trial judge to provide a direction on family violence where it is requested by counsel, unless there are good reasons not to, these amendments are targeted towards proactively tackling misconceptions regarding family violence. The trial judge will explain, *inter alia*, that family violence may be relevant to assessment of whether the primary victim was acting in self-defence; and that family violence may include sexual and psychological as well as physical abuse.⁹⁹ Importantly, the trial judge may inform jurors that there is no typical, proper or normal response to family violence. Jurors are to be advised that it is not uncommon for a primary victim of family violence to remain with an abusive partner, or to leave and return to that partner; and/or not to report or seek assistance to stop such conduct.¹⁰⁰ Social framework evidence is no longer limited to homicide cases and may extend to all self-defence claims. Amendments to the Evidence Act 2008 mean that the court can refuse to hear evidence where it unnecessarily demeans the victim.¹⁰¹ This change does not limit the use of evidence providing an important contextual narrative or where there are good forensic reasons for its admission.¹⁰² The effect is to address ‘the despicable practice of gratuitous blame directed at victims during homicide trials’, while simultaneously allowing evidence relating to family violence to be admitted.¹⁰³

A partial defence is still necessary

These provisions undoubtedly serve an important educative function in assessing the impact of family violence on the primary victim, but the extent to which they will affect the outcome of self-defence cases remains unclear. In this respect, the impact of these changes ‘should not be overstated’.¹⁰⁴ The case law demonstrates that there continues to be only limited understanding of the relationship between social framework evidence and defences. Section 322M must be considered in light of the other elements of self-defence; namely, that in murder cases the defendant must fear death or really serious injury.¹⁰⁵ In a detailed study of intimate partner homicide between 2005 and 2013, it was revealed that ‘there continues to be a focus on physical forms of violence and a lack of understanding of the serious impact of non-physical

98 Hansard (n 38) 3138 and 3146.

99 Jury Directions Act 2013, ss 31 and 32, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 4. See also, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, Hansard, 20 August 2014, Mr Clark Attorney General.

100 Jury Directions Act 2013, s 32, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 4.

101 See generally Jeremy Gans and Andrew Palmer, *Uniform Evidence* (OUP 2014).

102 Evidence Act 2008, s 135, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 3(9).

103 Hansard (n 38) 3138.

104 Hansard (n 9) Ms Pennicuik (Southern Metropolitan) 2419 citing Kirkwood et al (n 9).

105 ‘Although it has not been determined, it seems likely that it can include psychological injuries as well as physical injuries. It will be for the jury to decide whether what the accused was threatened with was an “injury” as well as whether that threatened injury was “really serious”’; Judicial College of Victoria (n 84) para 8.9.2.1, line 21. The case of *Creamer* indicates that being forced into group sex also amounts to serious injury; (n 68) 24–9. See also, DVRCV (n 38) 20.

forms of intimate partner violence, such as psychological coercion and intimidation, and sexual forms of violence’.¹⁰⁶ Black¹⁰⁷ was convicted and sentenced to 9 years’ imprisonment after pleading guilty to the defensive homicide of her de facto husband. Black stabbed him after he cornered her in the kitchen, repeatedly jabbing her with his finger. In evidence, Black said:

He was coming closer and closer to me . . . and I was thinking because he was so drunk he would probably want to force himself on me sexually . . . and I was just thinking what else could he do.¹⁰⁸

The sentencing judge noted that the aggressor was unarmed and that stabbing him twice might be viewed as disproportionate.¹⁰⁹ The threat was described as ‘being limited to intimidation, harassment, jabbing and prodding’.¹¹⁰ Black’s appeal against sentence was dismissed, the Court of Appeal concluding that the sentencing judge was ‘justified in making the observation that the violence which confronted the appellant was not as serious as many of the other cases’.¹¹¹ The cumulative impact of family violence and how it contributed to Black’s perception of the danger she faced was clearly misunderstood.¹¹² Where domestic violence has become the norm, the primary victim will have an acute awareness of the danger that she is in at the time of the act, but may subsequently understate the impact of that abuse. Black downplayed the violence she had suffered saying, ‘[h]e was never physically violent towards me, but he’d poke me with his fingers and point at me and jab me in the chest and forehead. He would sometimes force himself on me sexually.’¹¹³ In the absence of a partial defence, there is a real risk that the primary victim will be convicted of murder, particularly where the impact of family violence is misunderstood by the legal profession.

These concerns are compounded by the fact that a move to make juror directions mandatory where family violence is at issue was rejected by the Victorian Parliament in favour of judicial flexibility.¹¹⁴ There is a mandate requiring the trial judge to give directions where necessary to avoid substantial miscarriage of justice, but failure to make the family violence directions mandatory is arguably a missed opportunity. As Kirkwood et al point out, mandatory directions would have ‘an educative value for the judiciary and legal practitioners’, as well as assisting ‘judges to better direct juries when family violence is led, when the implications of the evidence are not spelled out by the defence, or when the evidence is used to argue for reduced culpability rather than an acquittal’.¹¹⁵ The onus rests on defence counsel to raise the issue, and, in practice, they will need to be, ‘sufficiently aware of family violence and to raise it at an early stage to avoid damage being done without it’.¹¹⁶ There is a risk that the new jury directions will be inconsistently applied, with potentially significant consequences in terms of juror decision-making.

¹⁰⁶ DVRCV (n 38) 20.

¹⁰⁷ Black (n 68).

¹⁰⁸ Ibid [18].

¹⁰⁹ Ibid [22].

¹¹⁰ Ibid.

¹¹¹ Black [2012] VSCA 75 [29].

¹¹² DVRCV (n 38) 39.

¹¹³ Black (n 68) [12].

¹¹⁴ Hansard (n 9) Mr Tee (Eastern Metropolitan) 2423.

¹¹⁵ Kirkwood et al (n 9) 22.

¹¹⁶ Hansard (n 9) Ms Pennicuik (Southern Metropolitan) 2419 citing the DVRCV, the Victorian Women’s Trust and Dr Danielle Tyson.

Jurors serve a vital role in such cases, but it is essential that appropriate guidance is available in order to help them in that role.

This lack of understanding at both a legislative and a practical level suggests that separating genuine from fabricated facts in order to prevent victim blaming might be difficult to achieve in practice.¹¹⁷ There was significant debate during the trial of Creamer as to whether she was a victim of domestic violence.¹¹⁸ The relationship between Creamer and the aggressor was described as 'largely, if not entirely, dysfunctional'.¹¹⁹ Each engaged in extra-marital affairs, encouraged by the aggressor.¹²⁰ The aggressor frequently requested that Creamer engage in group sex, which she 'resented strongly'.¹²¹ On the weekend of the killing, Creamer believed that the aggressor had arranged for her to engage in group sex. According to her evidence, the aggressor had hit her in the genitals with a knobkerrie while she was sleeping, accused her of having sex with his brother, and insisted that she smell his semen-stained sheets before placing them over her head.¹²² Immediately before the fatal act, the aggressor repeatedly smacked Creamer in the face and threatened to 'finish her off', before attempting to push his penis in her mouth and urinating on her.¹²³ Creamer managed to hit the aggressor in the genitals before grabbing a knife and stabbing him to death. The prosecution asserted that, rather than being a victim of domestic abuse, Creamer had initially denied her involvement in the killing because she had no excuse. She was portrayed as being jealous of the aggressor's extramarital affairs and annoyed at his decision to leave her for his former wife.¹²⁴ The forensic evidence did not fully accord with Creamer's account, and the sentencing judge rejected a significant proportion of her evidence, describing her as an 'unsophisticated witness'.¹²⁵ In particular, Coghlan J suggested that the jury had rejected Creamer's allegation that she had been raped previously by the aggressor because Creamer chose to stay with him and had not disclosed such evidence prior to trial.¹²⁶

Toole notes that the availability of defensive homicide worked to Creamer's advantage. Rather than 'being obsessive, jealous and controlling . . . her husband encouraged and facilitated [Creamer's] affairs'.¹²⁷ In this respect, Toole argues that defensive homicide had the 'potential to both protect and criminalise lethal conduct by women in inappropriate and unintended ways'.¹²⁸ In contrast, the Domestic Violence Resource Centre Victoria (DVRSV) contends that this assessment demonstrates a 'lack of understanding about how psychological manipulation, sexual degradation and coercive control are forms of family violence'.¹²⁹ The primary victim may feel unable to disclose

117 See, for example, *Creamer* (n 68) and *Sberna* [2011] VSCA 242; [2009] VSC 526. See generally Evidence Act 2008, s 135, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 3(9).

118 DVRCV (n 38) 27.

119 *Creamer* (n 68) [6].

120 *Ibid* [7].

121 *Ibid* [7] and [14].

122 *ibid* [17] and [19]. A knobkerrie is a South-African weapon in the form of a stick with a knob on the end of it [20].

123 *Ibid* [21]–[22].

124 *ibid* [10]–[12].

125 *Ibid* [16].

126 *Ibid* [32].

127 Toole (n 8) 283.

128 *Ibid* 286.

129 DVRCV (n 38) 28. See also, Evan Stark, 'Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58 *Albany Law Review* 973.

details of abuse because ‘of a deep sense of shame and self-blame’.¹³⁰ It is worrying that such abuse continues to be viewed at the ‘lowest end of the spectrum’.¹³¹ The amendments to prevent victim blaming and fact fabrication are welcome, but it may be difficult in practice to reliably distinguish genuine from disingenuous facts, particularly given the hidden nature of domestic abuse.

Irrespective of the changes to self-defence, it remains clear that some defendants will fall outside the scope of self-defence simply because the force used was excessive. In such cases, a reduction from murder to manslaughter may be apposite in terms of appropriate standardisation of the defendant’s culpability level.¹³² The suggestion that lower culpability may be reflected in sentencing mitigation where self-defence fails ignores the injustice associated with labelling the primary victim a murderer where she genuinely believed force was necessary, but was mistaken regarding the level of force. The murder label unfairly stigmatises those who kill their abusers and it ‘obscures the family violence to which s/he has been subjected’.¹³³ The Victorian Sentencing Council acknowledged that the removal of provocation would result in significantly higher sentences for provoked killers, given the increased maximum penalty and stigma attached to murder.¹³⁴ The same can be said of the abolition of defensive homicide. Experience in New Zealand is that primary victims are being convicted of murder and sentenced more harshly than if a partial defence was available.¹³⁵

The impact of abolishing the partial defence in New Zealand

The New Zealand criminal justice system has been described as ‘out of step internationally in the way it responds when the victims of family violence kill their abusers’.¹³⁶ Last year, the FVDRC noted that there needs to be a radical change in the way New Zealand deals with ‘dangerous and chronic cases of family violence’.¹³⁷ In particular, the FVDRC advocated reintroducing a partial defence to New Zealand, post-abolition of the provocation defence in 2009.¹³⁸ The New Zealand Law Commission (NZLC) had previously recommended abolition, complemented by developments to the law on self-defence. The NZLC advocated that priority should be given to drafting a new sentencing guideline to ensure that ‘full and fair account’ may be taken of provocative conduct and other mitigating factors during sentencing.¹³⁹ Provocation was abolished, but the remaining recommendations were not taken forward. The result is that self-defence laws in New Zealand remain demonstrably unsuited to primary victims who kill a predominant aggressor and, despite appellate court guidance on the impact of provocation in sentencing, primary

130 DVRCV (n 38) 27.

131 *Creamer* [2012] VSCA 182 [41].

132 See, for example, *Monks* [2011] VSC 626. Unlike other defensive homicide cases, Monks received little media attention and has been described as vindicating ‘the VLRC position that the offence could appropriately apply in family situations other than where a woman killed an abusive male partner’; Toole (n 8) 484.

133 Kirkwood et al (n 9) 6.

134 Sentencing Advisory Council (Vic), *Provocation in Sentencing: Research Report* (2009). The maximum sentence for manslaughter in Victoria is 20 years’ imprisonment. In contrast, the maximum sentence for murder is life imprisonment; Crimes Act 1958, ss 5 and 3, respectively.

135 See, for example, *Ribia* [2012] NZHC 6720; *Wibongi* [2012] 1 NZLR 755.

136 FVDRC (n 11) 6.

137 Ibid.

138 Ibid.

139 NZLC, *The Partial Defence of Provocation* (NZLC No 98 2007) paras 2.04 and 2.08.

victims are in a significantly worse position than if a partial defence was available.¹⁴⁰ As Brookbanks stated:

By abolishing the provocation defence, the legislature has drawn a line in the sand. Those who cross it, whatever their motive or disposition, can no longer expect a sentencing court to look at their situation with such compassion or understanding, as might have previously marked the court's response as a concession to their 'human frailty'.¹⁴¹

The self-defence provision operating in New Zealand appears to reflect the approach adopted in Victoria and England and Wales, but the manner in which it has been interpreted renders it difficult for primary victims to successfully claim the defence.¹⁴² Section 48 of the Crimes Act 1961 provides that: '[e]veryone is justified in using, in the defence of himself or another, such force, as in the circumstances as he believes them to be, it is reasonable to use'.¹⁴³ The relaxation of the imminence requirement in Victoria and England and Wales has not occurred in New Zealand, where 'immediacy of life-threatening violence' is required in order to justify killing in self-defence.¹⁴⁴ In cases where the defendant had a viable, non-violent option, the threat is not considered sufficiently imminent to satisfy self-defence. This approach fails to recognise that when a primary victim kills an intimate partner it will rarely be in the face of an imminent attack, since by then 'any attempt at self-protection may be too late'.¹⁴⁵ The apparently viable escape option is similarly not possible for the primary victim who fears that she will be in even more danger should she attempt to do so.¹⁴⁶ The FVDRC noted that by focusing on the imminence of the threat, the primary victim's circumstances are limited to a short time-frame. This results in vastly different rulings in factually similar cases where self-defence is precluded in the absence of an imminent threat.¹⁴⁷ The problem with this arbitrary approach to culpability is that it results in some primary victims being labelled murderers, while others receive an outright acquittal. The availability of a partial defence would assist in ameliorating this inherently unjust bifurcated divide between justified killings in response to an imminent threat and *ostensibly* unjustified killings undertaken when a predominant aggressor is off-guard. The circumstances of the primary victim have been acknowledged to a limited extent in that expert evidence is admissible to explain how she might be more aware of covertly threatening behaviour which may not appear objectively apparent. It remains clear, however, that self-defence in its current form does not adequately accommodate the circumstances of primary victims.¹⁴⁸ Like the VLRC, the NZLC recommended replacing the 'imminence'

140 NZLC (n 139) para 1.84. Horder and Fitz-Gibbon have suggested that the sentences imposed post-2009 might also be higher than those issued pre-2009 in the context of domestic abuse; Jeremy Horder and Kate Fitz-Gibbon, 'When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing' *Cambridge Law Journal* <doi: 10.1017/S0008197315000318>.

141 Warren Brookbanks, 'Provocation and Sentencing' (2013) (April) *New Zealand Law Journal* 120–4, 124.

142 Elisabeth McDonald, 'Criminal Defences for Women' in *Women in the Criminal Justice System* (New Zealand Law Society 1997) 46–9.

143 'Everyone authorized to use force is criminally liable for any excess according to the nature and quality of the act that constitutes that excess'; Crimes Act 1961, s 62.

144 Wang (1989) 4 CRNZ 674, 683.

145 NZLC, *Battered Defendants Victims of Domestic Violence Who Offend* (NZLC PP41 2000) para 38.

146 Ruth Busch, 'Don't Throw Bouquets at Me . . . (Judges) Will Say We're In Love: An Analysis of New Zealand Judges' Attitudes towards Domestic Violence' in Julie Stubbs (ed), *Women, Male Violence and the Law* (Institute of Criminology and Sydney University Law School 1994) 104.

147 FVDRC (n 11) 122.

148 Lavellee (n 87) cited in *Oakes* [1995] 2 NZLR 673, 676 (CA).

requirement with the need for an ‘inevitable attack’, but these recommendations were not acted upon.¹⁴⁹

The absence of a partial defence means that mitigating factors are considered solely during sentencing in determining whether a life sentence would be ‘manifestly unjust’ and in setting a minimum non-parole period. The restrictive sentencing regime operating in New Zealand mandates that a murder conviction automatically attracts a life sentence, unless the nature of the offence and the circumstances of the defendant would render such a sentence ‘manifestly unjust’.¹⁵⁰ The minimum non-parole period on a life sentence for murder may not be less than 10 years or 17 years in the ‘most serious cases’.¹⁵¹ It is only in ‘limited circumstances when a finite sentence may be imposed’.¹⁵² There is no legislative guidance on the impact of the predominant aggressor’s conduct and/or provocation in relation to the assessment of whether to impose a life sentence, but the Court of Appeal in *Hamidzadeh*¹⁵³ and *Tauleki*¹⁵⁴ confirmed that both are potentially relevant mitigating factors.¹⁵⁵ In all cases, only ‘exceptional’ circumstances will result in the presumption of life imprisonment being overturned.

The type of case in which the presumption has been rebutted include, inter alia, mercy-killing cases¹⁵⁶ and those involving serious domestic abuse.¹⁵⁷ Sentences of 10 years’ and 12 years’ imprisonment were issued in the cases of *Rihia*¹⁵⁸ and *Wihongi*,¹⁵⁹ respectively, which to date represent those cases in which a primary victim has been convicted of the murder of a predominant aggressor post-abolition of the provocation defence.¹⁶⁰ The low number is attributable to the rare cases in which a primary victim responds with lethal force rather than signifying that this particular category of defendant is being afforded an alternative defence.¹⁶¹ The horrific abuse and mental impairments suffered by *Rihia* and *Wihongi* meant that their cases were ‘exceptional’.

149 NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC Report 73 2001) 9–12.

150 Sentencing Act 2002, s 102 (1). “Unjust” can only mean that in the context of a particular murder and particular offender, the normal sentence of life imprisonment runs counter to both a Judge’s perception of a lawfully just result and also offends against the community’s innate sense of justice”; *O’Brien* (2003) CRNZ 572 [19].

151 *Hamidzadeh* [2013] NZSC 33 [5]. Sentencing Act 2002, ss 103 and 104. See, generally, Geoff Hall, *Sentencing: 2007 Reforms in Context* (LexisNexis 2007) 487.

152 *Hamidzadeh* (n 151) [4]. A life sentence is ‘almost invariably’ imposed; *Hessell* [2009] NZCA 450 [63].

153 *Hamidzadeh* (n 151). For a helpful analysis of the *Hamidzadeh* case see, Brookbanks (n 141) 120–4.

154 [2005] 3 NZLRC 372.

155 See, generally, Sentencing Act 2002, s 9(1) and 9(2).

156 In *Law* (2002) 19 CRNZ 500, the mercy killing of an elderly woman suffering from Alzheimer’s disease by her husband attracted an 18-month term of imprisonment. See also, *Reid* HC Auckland CRI-2008–090–2203, 4 February 2011 (confessing to a crime that might not have otherwise been discovered and attempting suicide after the offence indicated significant remorse – the defendant suffered from major depression and psychotic delusions); *Cunnard* [2012] NZHC 815 (peripheral role as a secondary party, previous good character, evident remorse, restorative justice conference held with the victim); *Nelson* [2012] NZHC 3570 (deficiency in decision-making faculties, youth, inability to process information, tumultuous family situation); see, generally, Rajesh Chhana, Philip Spier, Susan Roberts and Chris Hurd, *The Sentencing Act 2012: Monitoring the First Year* (Ministry of Justice 2004).

157 See *Rihia* and *Wihongi* (n 135).

158 *Rihia* (n 135).

159 For an in-depth analysis of the case of *Wihongi* (n 135), see Nicola Wake, ‘Anglo-Antipodean Perspectives on the Positive Restriction Model and Abolition of the Provocation Defence’ in Ben Livings, Alan Reed and Nicola Wake (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholars Publishing 2015) 391–9.

160 FVDR (n 11) 6.

161 *Ibid* 102.

This resulted in the notorious presumption of life imprisonment being overturned in each case.¹⁶²

A comparison between *Rihia* and the earlier manslaughter conviction of *Sualape* demonstrates the stark reality that primary victims are not only being convicted of murder, but sentences are double the length of those imposed pre-2009 in factually similar cases. *Rihia* was convicted and sentenced to 10 years' imprisonment after she pleaded guilty to the murder of her estranged husband. Their relationship was plagued by violence and alcohol abuse.¹⁶³ They had been drinking heavily throughout the day, during the course of which their seven-year-old daughter was removed by Child, Youth and Family Service staff over concerns regarding the alcohol consumption and the predominant aggressor's presence at the property. Fearing a retaliatory beating, and angry at the predominant aggressor's involvement in the removal of their daughter, *Rihia* stabbed him in the chest during the course of an argument.¹⁶⁴

Psychologists described *Rihia* as suffering from 'complex post-traumatic stress disorder' and 'borderline personality disorder' characterised by 'alcohol abuse, emotional dysregulation, outbursts of anger, and feelings of abandonment' induced by familial violence.¹⁶⁵ *Rihia*'s parents were alcoholics and she had been removed from their care as a consequence of abuse. *Rihia* was abused by her first husband, with the result that her seven children were taken into care.¹⁶⁶ The 'extreme reaction' to *Rihia*'s despair at losing her daughter was described by the sentencing judge 'as being rooted firmly in the abuse' she had suffered from the predominant aggressor and others.¹⁶⁷ There were 36 reported incidents of violence between *Rihia* and the predominant aggressor. Police confirmed that in 33 out of the 36 cases the predominant aggressor was responsible, and the court said it was 'reasonable to infer that there were more than only three or four incidents a year'.¹⁶⁸ The trial judge was satisfied that *Rihia* would not have killed 'had it not been for the significant impairment' she suffered through years of alcohol and physical abuse.¹⁶⁹

Sualape, in contrast, received a sentence reduction of 7.5 years to 5 years on grounds that the initial sentence did not reflect the cumulative impact of the abuse and degradation she suffered, in addition to her vulnerability by reason of ethnic and cultural background.¹⁷⁰ *Sualape* successfully argued that she was provoked to kill her abusive partner of over two decades after he said he was leaving her for another woman. The initial sentencing judge described the killing as 'brutal'. *Sualape* had questioned the predominant aggressor over his decision to leave her before repeatedly hitting him over the head with an axe in what *Randerson J* dubbed a 'frenzied attack' with a 'strong element of deliberation about it'.¹⁷¹ It was not accepted that *Sualape* suffered from battered-woman syndrome and the degree of physical and emotional abuse was deemed

162 *Hamidzadeh* (n 151) 33. See also, *Rapira* [2003] 3 NZLRC 794 (CA) [121]. The assessment as to whether the presumption is displaced must be undertaken in light of ss 7–9 of the Sentencing Act 2002.

163 *Rihia* (n 135) [2].

164 *Ibid* [10]–[12].

165 *Ibid* [20].

166 *Ibid* [28].

167 *Ibid* [30].

168 *Ibid* [16].

169 *Ibid* [28].

170 *Sualape* [2002] NZCA 6.

171 *Ibid* citing original ruling [6]–[8].

to be exaggerated.¹⁷² According to Randerson J, it was the sexual infidelity which proved to be the main trigger for a killing on the borderline between murder and manslaughter. The jury’s verdict was termed ‘merciful’ in the circumstances.¹⁷³ That ‘merciful’ decision resulted in a sentence 2.5 years shorter than that imposed in *Ribia*, despite Randerson J’s obvious misgivings regarding the verdict.

Upon appeal, Baragwanath J concluded that Randerson J had not attached sufficient weight to the family abuse suffered by Sualape. The appellant’s role in what was described as a ‘chronically dysfunctional marriage’ was governed by ‘traditional Samoan norms’.¹⁷⁴ The appellant was responsible for the care of her four children from a previous marriage, five children with the predominant aggressor, his disabled mother, and eight of his brother’s children whose wife had died.¹⁷⁵ The relationship involved physical and emotional violence, including bashings, cutting with a machete, and the infliction of a venereal disease, consequent upon repeated infidelities.¹⁷⁶ The aggressor was a world-renowned tattoo artist, popular for *p’ea* tattoos which are designed to display cultural identity, and commonly used as part of a ‘right [sic] of passage’ ritual into manhood.¹⁷⁷ On one occasion, he organised a tattooist convention which was of cultural significance to the local Samoan community, in which the appellant’s family were prominent, and attended with a lover with whom he ‘cohabited openly’.¹⁷⁸ It was said that this brought great shame to Sualape’s family.

Baragwanath J held that essential considerations ought to have included: the exemplary past behaviour of the primary victim; the cumulative impact of the sustained pattern of abusive and insulting conduct of the predominant aggressor; the gross humiliation of the appellant and her family by the aggressor’s conduct in Samoa; and the appellant’s perception, from what appeared to be a position of subordination in both her relationship and culture, of a lack of realistic options available effectively to relieve herself of what was progressively becoming an intolerable burden.¹⁷⁹ Sualape’s actions were ‘more than a jealous response by a jealous wife, but the consequence of the victim’s treatment of her over two decades, and of her limited perception of means by which it might be resisted’.¹⁸⁰

Randerson J’s view reflected a narrow interpretation of Sualape’s circumstances, which focused principally on the fatal attack and the exchange between the primary victim and predominant aggressor immediately preceding it. By labelling sexual infidelity as the triggering event, Randerson J implied that Sualape’s conduct was undertaken in response to the predominant aggressor’s attempt to exercise personal autonomy in leaving a relationship to commence a new one. In reality, his sexual infidelity constituted the final straw in the living nightmare he had inflicted on her, and it was this combination that eventually tipped her over the edge. In this respect, it is essential that sexual infidelity is considered as part of the narrative leading to the fatal act. More recently, the Court of Appeal in *Hamidzadeh*¹⁸¹ recognised that the ‘circumstances in which sexual infidelity may be treated as reducing culpability is a difficult issue’.¹⁸² Their Lordships noted Lord Judge CJ’s comments, in

172 *Sualape* (n 170) citing original ruling [15] and [22].

173 *Ibid* citing original ruling [27].

174 *Ibid* [3] and [7].

175 *Sualape* (n 170) [4].

176 *Ibid* [5].

177 Karen Hudson, ‘Tattooist Murdered’ (1999) about.com.

178 *Sualape* (n 170) [6].

179 *Ibid* [8].

180 *Ibid* [23].

181 *Hamidzadeh* (n 151).

182 *Ibid* [64].

Clinton, on the sexual infidelity exclusion in the loss of control defence.¹⁸³ Lord Judge acknowledged that:

Sexual infidelity has the potential to create a highly emotional situation or to exacerbate a fraught situation, and to produce a completely unpredictable, and sometimes violent response. This may have nothing to do with any notional 'rights' that the one may believe she or he has over the other, and often stems from a sense of betrayal and heartbreak, and of crushed dreams.¹⁸⁴

The Court of Appeal, in *Hamidzadeh* concluded, however, that 'while an angry and emotional response to the end of a relationship may be understandable, the ordinary expectation of the community is that this ought not to justify the use of violence, especially where there are fatal consequences'.¹⁸⁵ The problem is that in cases like *Sualape* the sexual infidelity and revelation that the relationship is at an end constitutes 'an important and relevant component of the cocktail of events' that combined to make the defendant lose control.¹⁸⁶ The sexual infidelity served to humiliate and degrade the victim in circumstances which she was powerless to prevent. In this respect, the sexual infidelity formed part of the domestic abuse, in a similar way that taunts designed to belittle or denigrate the victim do. As the Court of Appeal identified in *Clinton*, to 'compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole . . . is unrealistic and carries with it the potential for injustice'.¹⁸⁷

The ruling in *Sualape* also highlights the problems associated with focusing on a narrow time-frame in domestic abuse cases. Despite Randerson J's misgivings regarding the mitigatory force of the abuse *Sualape* suffered and the respective (lack of) weight attached to sexual infidelity, the sentence imposed was significantly shorter than that imposed in the similar case of *Ribia*. The problem with considering mitigation solely at the sentencing stage is that it circumvents important juror and therefore societal evaluation as to whether a manslaughter verdict and a corresponding lower sentence ought to apply. The role of the jury in such cases represents an important 'bulwark against overzealous prosecutors and cynical judges'.¹⁸⁸ The jury verdict confers 'a societal stamp of approval that must be given weight'. It tends to result 'in both a finite sentence, and a sentence that is likely to be somewhat shorter than the lowest available minimum term for murder'.¹⁸⁹ In all cases, however, it is essential that the defence is appropriately framed and sufficient guidance is provided to jurors in order for them to perform their role effectively.

The *via media*: a new partial defence

It is essential that New Zealand and Victoria adopt a more 'nuanced and less black and white approach to reforming of the criminal defences to homicide'.¹⁹⁰ An optimal solution would be to introduce a new partial defence predicated on a fear of serious violence.¹⁹¹ This entirely new defence draws upon earlier recommendations of the Law Commission for

¹⁸³ *Clinton* [2012] EWCA Crim 2; [2012] 3 WLR 515 [16], cited in *Hamidzadeh* (n 151) [65].

¹⁸⁴ *Clinton* (n 183) [16].

¹⁸⁵ *Hamidzadeh* (n 151) [68].

¹⁸⁶ Hansard, Parliamentary Debates, HC Deb 9 November 2009, col 88 (Mr Grieve).

¹⁸⁷ *Clinton* (n 183); see also Horder and Fitz-Gibbon (n 140) 18 and 20.

¹⁸⁸ Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York University Press 2003) 247.

¹⁸⁹ NZLC (n 139) para 1.89. Although compare the contrasting sentences in comparable provocation cases; *Ali* (3 years) and *Edwards* (9 years); *ibid*, para 1.90.

¹⁹⁰ FVDRC (n 11) 103.

¹⁹¹ Coroners and Justice Act 2009, s 55(3). See also, Law Commission No 304 (n 16) para 5.55.

England and Wales, in addition to an in-depth review of the operation of ss 54 and 55 of the Coroners and Justice Act 2009, as enacted.¹⁹² The partial defence would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious violence from the victim against the defendant or another identified individual.¹⁹³ The defence is qualified by appropriate threshold filter mechanisms designed to preclude the availability of the defence in unmeritorious cases. These clauses include a normal person test and provisions stipulating that the defence is not available where the defendant intentionally incited serious violence, acted in a considered desire for revenge, or on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.¹⁹⁴ In cases where sufficient evidence is raised that the partial defence might apply, it is then for the prosecution to disprove the defence to the usual criminal standard. The defence should be complemented by bespoke provisions on social framework evidence and *mandatory* juror directions where family violence is in issue. An interlocutory appeal procedure designed to prevent unnecessary appellate court litigation is also outlined. The following analysis illustrates that this novel model provides an appropriate *via media* for the introduction of a new partial defence to Victoria and New Zealand, with the added benefit of developments based upon the experience of the operation of the loss of control defence in England and Wales.

The proposed defence requires that the defendant feared serious violence from the victim against the defendant or another identified individual. This mirrors the ‘fear trigger’ operating under the loss of control defence.¹⁹⁵ It is also similar to defensive homicide, which required the defendant to fear death or really serious injury. The proposed defence is designed to be available where the defendant kills in response to an anticipated (albeit not imminent attack); and where the defendant over-reacts to what she perceived to be an imminent threat.¹⁹⁶ Whether the defendant feared serious violence engages an entirely subjective enquiry.¹⁹⁷ The fear must be genuine but it need not be reasonable. Arguably, it would be difficult to prove that the fear was genuine if it were not based on reasonable grounds. There is no need to extend the defence to circumstances falling short of serious violence, but social framework evidence should be utilised to explain why an ostensibly trivial incident might cause the primary victim to fear such violence.¹⁹⁸ The term violence should be broadly construed as including psychological¹⁹⁹ and sexual harm, in addition to physical violence.²⁰⁰ It should also include coercive or controlling behaviour as identified under the Serious Crimes Act 2015, which introduced a new offence based on such conduct.²⁰¹ The offence provides overdue recognition of the impact of coercive and

192 Law Commission No 290 and Law Commission No 304 (n 16).

193 Coroners and Justice Act 2009, s 54(3).

194 Ibid s 54 (5)–(6).

195 Ibid s 55(3).

196 Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (Consultation Paper 19/08, 2008) para 28.

197 ‘[T]he reasonableness requirement is out of place when we are thinking of people who are acting out of fear or anger and are therefore likely to be in a somewhat emotional state’; Law Commission No 290 (n 16) para 3.154.

198 Law Commission No 304 (n 16) para 5.55.

199 Psychological abuse need not ‘involve actual or threatened physical or sexual abuse’ and may include (i) intimidation; (ii) harassment; (iii) damage to property; (iv) threats of physical abuse, sexual abuse or psychological abuse; Crimes Amendment (Abolition of Defensive Homicide) Act 2014, s 322J.

200 See, Rudi Fortson QC, ‘Homicide Reforms under the CAJA 2009’ (Criminal Bar Association 2010) para 90.

201 Serious Crimes Act 2015, s 76.

controlling practices, and it is appropriate that the definition of serious violence under the new defence incorporates this form of conduct.²⁰²

A fundamental difference between defensive homicide and the newly proposed defence is that defensive homicide remained unqualified by appropriate threshold filter mechanisms. The proposed defence is qualified by the normal person test which mandates that a person of the defendant's age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant might have reacted in the same or a similar way.²⁰³ The VLRC was critical of the normal person test because it involves 'speculation about how a person *might have* reacted in the circumstances'.²⁰⁴ This approach is necessary because it is impossible to say how a person *would have* reacted in the circumstances, particularly where there is evidence of domestic abuse.²⁰⁵ The proposed test is similar to the normal person test operating in relation to the loss of control defence, with the exception that the term 'sex' is omitted. Use of the term 'sex' overstates the 'role of sex and gender in explaining D's reaction'.²⁰⁶ In this respect, sex and gender are better considered by the judge and jury as part of the broader circumstances of the case.²⁰⁷ Akin to the loss of control defence, 'circumstances' in this context is a reference to all of the defendant's circumstances other than those whose only relevance to the defendant's conduct is that they bear on her general capacity for tolerance and self-restraint.²⁰⁸ In cases where the defendant has a recognised medical condition relevant to her fear of serious violence then that might, like sex and gender, form part of the circumstances for consideration.²⁰⁹ A normal degree of tolerance means that, in evaluating the defendant's conduct, the jury cannot take into account irrational prejudices, such as racism and homophobia.²¹⁰ A normal degree of self-restraint excludes characteristics such as bad temper, jealousy, irritability and intoxication. Unlike the loss of control plea, the proposed defence specifically excludes self-induced intoxication from the assessment of the defendant's capacity for tolerance and self-restraint.²¹¹ This statutory exclusion is designed to prevent unnecessary litigation in cases where the defendant is voluntarily intoxicated.

In terms of determining whether the proposed defence applies, the defendant's fear of serious violence is to be disregarded in cases where the defendant intentionally incited serious violence. The intentional incitement clause is different from s 55(6)(a)–(b) of the 2009 Act which stipulates that the defence will be unavailable where the defendant incited something to be said or done for the *purpose* of using it as an excuse to use violence. In *Daves, Hatter and Bonnyer*, the Court of Appeal held that the mere fact that the defendant was, 'behaving badly and looking for and provoking trouble' does not mean the defence is

202 In Victoria, violence also includes causing or putting a child at risk of witnessing physical, sexual or psychological abuse of a person by a family member, and this could form part of a new Victorian provision; Crimes Amendment (Abolition of Defensive Homicide) Act 2014, s 322j.

203 Coroners and Justice Act 2009, s 54(1)(c) and (3).

204 VLRC (n 19) para 3.84 (emphasis in original).

205 Fortson (n 200) para 148. Although cf Jo Miles, 'A Dog's Breakfast of Homicide Reform' (2009) 6 Archbold News 8.

206 Neil Cobb and Anna Gausden, 'Feminism, "Typical" Women, and Losing Control' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2011) ch 7.

207 Ibid.

208 Coroners and Justice Act 2009, s 54(3).

209 *Asmelash* (n 74).

210 Coroners and Justice Act 2009, s 54(1)(c).

211 Ibid.

unavailable.²¹² This is because self-induced triggers are viewed in a narrow sense only for the purposes of the loss of control defence.²¹³ The exclusion will arguably only apply where the defendant has ‘formed a premeditated intent to kill or cause grievous bodily harm to the victim, and incites provocation by the victim so as to provide an opportunity for attacking him or her’.²¹⁴ This approach was applied in *Duncan*,²¹⁵ where a defendant successfully claimed the partial defence after stabbing a love rival to death. Duncan was shopping with his two children when he saw the victim. As a result of seeing him, Duncan purchased a small-bladed paring knife, removed the packaging and concealed it within a carrier bag. His explanation was that some days before the victim had confronted him in a similar location and threatened him with a knife. According to witnesses, Duncan then proceeded towards the victim shouting at him. A fight ensued, during the course of which, the victim slashed Duncan across the face and body with a knife. It was at that point, Duncan claimed to have momentarily lost self-control and stabbed the victim to death. Duncan’s loss of control plea was accepted by the Crown, Lord Thomas advocating that the case should be seen:

As an acceptance of a basis of plea in a one-off case in circumstances which we have not gone in to. It should not be regarded as any precedent that where two people arm themselves and a wound is caused in the course of an intended knife fight, that that would ordinarily give rise to a loss of self-control.²¹⁶

Despite the warning of Lord Thomas, the case illustrates that the circumstances in which a defendant’s conduct might be construed as having been done for the *purpose* of using it as an excuse to use violence are likely to be limited. The Law Commission of England and Wales opined that to exclude the defence ‘in the broader sense of self-induced provocation would be to go too far’.²¹⁷ Such an approach might exclude deserving claims where the incitement was induced by ‘morally laudable’ conduct, for example, ‘standing up for a victim of racism in a racially hostile environment’.²¹⁸ The Law Commission did identify that ‘there is much to be said . . . in denying a defence to criminals whose unlawful activities expose them to the risk of provocation by others’.²¹⁹ The recommended intentional incitement clause provides a *via media* between these ostensibly polarised approaches to self-induced provocation.

The provision would operate where the defendant *intentionally incited serious violence*. The defendant’s conduct must be done for the *purpose* of inciting serious violence. In this respect, the ‘mere fact that the defendant caused a reaction in others’ would not result in the defence being excluded.²²⁰ The approach in *Daves, Hatter and Bonnyer*, that provocative behaviour does not negate the defence, is equally applicable to the new proposal. This ensures that confrontational circumstances do not automatically preclude the partial defence, but, where the defendant intends to incite serious violence, the defence is

²¹² *Daves, Hatter and Bonnyer* [2014] 1 WLR 947 [58].

²¹³ Law Commission No 304 (n 16) para 3.139.

²¹⁴ *Ibid*.

²¹⁵ *Duncan* [2014] EWCA Crim 2747.

²¹⁶ *Ibid* [11].

²¹⁷ Law Commission No 304 (n 16) para 3.139.

²¹⁸ *Ibid*.

²¹⁹ *Ibid*.

²²⁰ *Johnson* [1989] EWCA Crim 289 (CA) Watkins LJ. Note that the Court of Appeal in *Daves, Hatter and Bonnyer* (n 212) noted that ‘the impact of *R v Johnson* is now diminished, but not wholly extinguished by the new statutory provisions’; [58]. See also, *Richard Anthony Daniel v The State* [2014] UKPC 3 [17]–[33].

precluded.²²¹ This is important as the primary victim may feel responsible for inciting the aggressor's response because she is aware that doing X makes him angry, but it cannot be said that it was her *intention* to have that effect. Contrary to the Law Commission's observation, judges and jurors would be in a position to 'differentiate satisfactorily between forms of self-induced provocation in the broader sense which should, and which should not, preclude a defence'.²²² It is true that this would be a challenging task, given the potential variables, but at present the exclusionary clause serves little purpose when viewed in the narrow sense, since arguably cases of premeditated killing would be excluded via s 54(4) of the 2009 Act in any event.

Section 54(4), which provides that the loss of control defence is not available where the defendant acted in 'a considered desire for revenge', forms part of the proposed framework.²²³ The clause operates to prevent the use of the defence in premeditated, cold-blooded killings, but it does not preclude the defence simply because the defendant was angry at the victim for conduct which engendered a fear of serious violence.²²⁴ The Royal College of Psychiatrists noted that:

Physiologically anger and fear are virtually identical, whilst many mental states that accompany killing also incorporate psychologically both anger and fear . . . [T]he abused woman who waits until the man is 'helpless' is likely, not merely to be angry but also fearful that he will eventually kill her, and/or her children and that there is no way of preventing it other than by the death of the man.²²⁵

The word "considered" denotes something over and above simple revenge²²⁶ and, as such, the primary victim who claims 'He deserved it!' remains eligible to claim the defence because jurors are in a position to distinguish genuine cases involving an element of retaliation from disingenuous claims.²²⁷ Nevertheless, it may be difficult 'to determine whether the killing was one motivated by a considered desire for revenge or from other emotions' and, for this reason, social framework evidence should be used to explain why the primary victim may experience a complex array of emotions at the time of the fatal act.²²⁸

The proposed legislative framework does not include the loss of control requirement which is integral to ss 54 and 55 of the 2009 Act in England and Wales. By avoiding this controversial requirement, the proposed partial defence is closely aligned with self-defence. In cases where self-defence fails, the new partial defence might apply. At present, in England and Wales, a defendant claiming self-defence on grounds of a fear of serious violence may revert to a loss of control claim where the initial plea fails.²²⁹ The problem is that the defendant will have to revert from alleging that she was acting reasonably in the

221 This is in line with the Law Commission's recommendation that the defence 'must not have been engineered by him or her through inciting the very provocation that led to it'; Law Commission No 304 (n 16) para 5.20. See also, Ministry of Justice (n 196) para 27. See generally Law Commission No 304 (n 16) para 3.139.

222 Law Commission No 304 (n 16) para 3.139.

223 Coroners and Justice Act, s 54(4).

224 Law Commission No 304 (n 16) paras 3.137 and 5.11.

225 Law Commission, *Partial Defences to Murder* (Law Com Consultation Paper No 173 2003) para 3.99.

226 *Evans* [2012] EWCA Crim 2 (Christopher Clee QC).

227 Law Commission No 304 (n 16) para 1.137.

228 David Ormerod, *Smith and Hogan's Criminal Law* (OUP 2011) 511.

229 Nicola Wake, 'Battered Women, Startled Householders and Psychological Self-defence' (2013) 77(5) *Journal of Criminal Law* 433, 434.

circumstances to asserting that she lost self-control. This is apt to cause juror confusion.²³⁰ Rejection of the loss of control requirement also avoids the inherent contradiction in requiring the primary victim to simultaneously fear serious violence and lose self-control. For these reasons, loss of self-control does not form part of the proposed defence herein.

The loss of self-control requirement was introduced by the government of England and Wales in order to prevent the defence from being used inappropriately in cases of cold-blooded, gang-related or honour killings.²³¹ A review of jurisprudential authority suggests, however, that a significant number of loss of control claims are being filtered out *unnecessarily* by the loss of self-control element. It is right that these claims are being rejected, but the loss of self-control requirement is unnecessary because these claims could be filtered out by the alternative threshold filter mechanisms within the partial defence. As previously stated, loss of control and the newly proposed defence are unavailable where the defendant ‘acted in a considered desire for revenge’.²³² Lord Judge CJ, in *Evans*, advocated that there ‘was no need to rewrite . . . the language of the statute’.²³³ In all cases, ‘the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self-control’.²³⁴ The ‘considered desire for revenge’ exclusion is a more appropriate instrument for filtering out unmeritorious claims because, unlike the loss of self-control mandate, the ‘words “considered”, “desire” and “revenge” are not words of legal technicality. They are words of ordinary use.’²³⁵

The trial judge, in *Jewell*,²³⁶ refused to leave the partial defence to the jury where the defendant prepared firearms and a survival kit 12 hours before he drove to the victim’s home, armed with a shotgun and home-made pistol, and shot him without warning.²³⁷ Jewell’s explanation was that he feared serious violence from the victim who had allegedly threatened to kill him the evening before. The killing ‘bore every hallmark of a pre-planned, cold-blooded execution’.²³⁸ There was a 12-hour ‘cooling period’ between the alleged threat and the actual killing in which Jewell could have sought an alternative course of action, but failed to do so. The defence, however, was negated not by virtue of s 54(4), but by the loss of self-control requirement. The trial judge considered the remaining elements of the defence ‘out of an abundance of caution’ but that assessment was ‘unnecessary as a dispositive conclusion’.²³⁹

The extent to which the loss of self-control requirement impacts upon the utility of the alternative threshold filter mechanisms within the defence was similarly highlighted in the

230 Wake (n 229) 438. In *Kojo-Smith and Caton* [2015] EWCA Crim178; [2015] 1 Cr App R 31 [88], counsel identified that the suggestion that the defendant might have reacted in anger would not assist in considering self-defence, but might imply a loss of self-control. Cf *R v Ward* [2012] EWCA Crim [2 1] and [11 10], where a loss of control plea was accepted following the rejection of affirmative self-defence.

231 Ministry of Justice (n 196) para 36. The term ‘gang’ is defined in the Policing and Crime Act 2009, pt IV, s 34(5), as amended by the Serious Crime Act 2015.

232 Coroners and Justice Act 2009, s 54(4).

233 *Evans* (n 226) [131].

234 *Ibid* [10].

235 *Ibid* (Andrew Edis QC and Simon Waley).

236 *Jewell* [2014] EWCA Crim 414.

237 *Ibid* [43].

238 *Ibid* [43].

239 *Ibid* [47].

case of *Barnsdale-Quean*.²⁴⁰ The defendant had purchased a rolling pin and chain two weeks prior to the killing. On the day of the killing, he collected the chain from a flat in which he had stored it and the rolling pin from the kitchen. He tied two elasticated bands in a loop at the end of the chain, and carefully placed it over his wife's head while she was subdued due to antidepressant medication. He used the rolling pin as a tourniquet to strangle his wife to death before stabbing himself in an attempt to make it appear that she had committed suicide after attacking him. Barnsdale-Quean claimed that he could not remember what had occurred following his wife's alleged attack. The trial judge ruled that there was no loss of self-control on the facts or the defendant's account. In the event that the defendant had lost self-control, the defence would be negated by virtue of s 54(4). The Court of Appeal advocated that it was unnecessary to reach a conclusion in respect of s 54(4) because there was no evidence of loss of self-control. These rulings demonstrate that s 54(4) is capable of filtering out unmeritorious cases in the absence of the loss of self-control requirement.

In all cases, should the outlined threshold filter mechanisms of the proposed defence be bypassed, the trial judge has the authority to reject a claim on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.²⁴¹ The grounds for the plea would be considered at a pre-trial hearing under case-management procedures. The implementation of an interlocutory appeal route would mean that the trial judge's decision could be challenged (only) before trial, thereby preventing unnecessary appellate court litigation.²⁴² In cases where family violence is in issue, the trial judge will be charged to provide juror directions equivalent to those operating in relation to self-defence in Victoria, considered above; the difference being that these directions ought to be mandatory. This will ensure that appropriate directions are consistently provided in all cases, rather than relying on ad hoc requests made by counsel.

Conclusion

The amendments to self-defence, social framework evidence and juror directions in Victoria challenge the traditional male-oriented perception of self-defence involving violent confrontations between parties of comparable strength. This view is incompatible with killings in response to familial abuse and, as such, the changes in the law serve an educative function, highlighting the need for greater understanding of the circumstances of the primary victim in order to ensure that self-defence captures deserving cases outwith traditional gender-biased notions of self-defence. Nevertheless, there will continue to be cases involving family violence that fall outside the scope of revised self-defence. In the absence of an applicable partial defence, the primary victim may face a murder conviction and longer sentence. This is the experience in New Zealand, post-abolition of the provocation defence in 2009. The injustice associated with labelling the primary victim a

²⁴⁰ *Barnsdale-Quean* [2014] EWCA Crim 1418. It is true that killings involving gang-related violence may be filtered out by the loss of self-control requirement, but such a claim would more efficaciously be filtered out by the fear of serious violence trigger on the basis that 'fear of serious violence' ought to be distinguished from 'fear before engagement in a fight'. Further, a person of the defendant's age with a normal degree of tolerance and self-restraint is unlikely to react in the same or a similar way to a gang member; *R v Gurpinar* [2015] EWCA Crim 178; [2015] 1 Cr App R 31 [55]. See also, *Kojo-Smith and Caton* (n 230) [94].

²⁴¹ Coroners and Justice Act 2009, s 54(5)–(6). '[I]n many mixed motive cases the judge might take the view that, even if there is no "considered desire for revenge", it is nonetheless a case where no reasonable jury would find that the defence applies. We regard it as significant that of the provocation cases studied . . . in the two involving honour killing both the accused were convicted of murder. We are confident that that result would be no different under our recommendations.'; Law Commission No 304 (n 16) para 5.27. See also, paras 5.11(5), 5.25–32, and 5.60. Lord Judge identified that the fear trigger implies a higher threshold test than the common law had; *Thornley* [2011] EWCA Crim 153 [15] cited in *R v Lodge* [2014] EWCA Crim 446.

²⁴² Law Commission No 304 (n 16) para 5.16.

murderer and the longer sentences imposed have resulted in calls for the reintroduction of a partial defence within that jurisdiction. The risk that primary victims may be convicted of murder is unacceptable, irrespective of the sentencing regime operating in these jurisdictions.

The introduction of a new partial defence, predicated on a fear of serious violence, provides an appropriate *via media* and optimal solution within both jurisdictions. The newly proposed framework would sit cogently alongside developments to self-defence in Victoria, providing a more comprehensive package of defences covering the potential various circumstances in which a primary victim may respond with lethal force. For New Zealand, the proposed defence is far removed from provocation and earlier concerns regarding the operation of that defence. It ensures that a partial defence is available to the primary victim who kills fearing serious violence from a predominant aggressor. The novel defence is restricted by the threshold filter mechanism of the normal person test, and alternative clauses stipulating that the defence is not available where the defendant intentionally incited serious violence, acted in considered desire for revenge, or on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.²⁴³ These proposals should be complemented by social framework evidence and mandatory juror directions, similar to those operating in Victoria. This would ensure that the partial defence is available only in deserving cases. A new interlocutory appeal procedure would provide defendants with an opportunity to challenge the judge’s refusal to admit the defence prior to trial, thereby preventing unnecessary appellate court litigation. The abolition of all general partial defences in Victoria and New Zealand ought to be reconsidered, and this new proposal provides an optimal framework on which to base a new defence.

243 Coroners and Justice Act 2009, s 54(5)–(6).

Conclusion

There are mixed views regarding the legitimacy of retaining variations of the provocation defence. For some, it is inappropriate to afford a defence, or even a partial defence, to an individual who loses self-control and kills in response to the conduct of the victim.¹⁷⁹ For those individuals, this type of case ought to be dealt with via self-defence or mitigation in sentencing. The problem with this approach is that it is not always possible for the primary victim to claim self-defence, and experience in NZ demonstrates that, even in jurisdictions where the mandatory life sentence has been abolished, sentences are often higher than they would be if partial defences were available.¹⁸⁰ Numerous calls for the reintroduction of a ‘provocation-type’ partial defence in NZ have been made,¹⁸¹ resulting in the Minister of Justice asking the Law Commission, ‘as a matter of priority’, to consider the ‘position of victims of family violence (almost overwhelmingly women) who are driven to commit homicide, and what the consequences in law of their actions should be’.¹⁸² The research underpinning these publications has been used to submit a response, including a draft of the partial defence advanced in (ix), to the Commission.¹⁸³

The introduction of a new partial defence is the first step; reforms focus must remain on the availability of appropriate defences and support for vulnerable offenders. The current position in NZ as it applies to the victims of family violence is unacceptable. There is a need for a partial defence in cases of this context, and the models outlined in these publications provide optimal solutions for future reform to the law in Victoria and NZ. The proposals advanced also chart a pathway for developments to the problematic loss

¹⁷⁹ Howe (n 15).

¹⁸⁰ See, for example, *Rihia* (n 70); and, *Wihongi* (n 70).

¹⁸¹ Steve Bonnar QC identified: ‘There are plenty of circumstances where I think the community would consider that a person who has killed under extreme...duress or provocation should not be called a murderer. They should be guilty of a lesser offence’; Radio NZ News, ‘Legal Support for Provocation Defence’ (2014) available at <http://www.radionz.co.nz/news/national/248211/legal-support-for-provocation-defence> accessed 25 October 2015. See also, Hannah Norton, ‘Time to bring back the provocation defence’ NZ Lawyer (2015) available at: <<http://www.nzlawyermagazine.co.nz/news/time-to-bring-back-the-provocation-defence-202212.aspx>> accessed 25 October 2015. See also, FVDRC *Fourth Annual Report* (2014) (n 46).

¹⁸² NZ Law Com IP 39, 2015 (n 11) vi.

¹⁸³ It is too early to tell whether there will be similar calls for the reintroduction of a ‘provocation-type’ defence in Victoria, but judging by the NZ experience it is likely that there will be. Although, see the recent case of *DPP v Bracken* [2014] VSC 94.

of control and extreme provocation defences operating in E&W, and NSW, respectively.¹⁸⁴

¹⁸⁴ As Tolmie expressed: ‘The most disheartening reviews for me to read are ones where [sic] the woman is quite clearly fighting for her life. She sees that she’s is [sic] going to die and she is actively taking every action she possibly can to save her life. She’s contacting the police, she’s telling landlords, she’s telling the neighbours, she’s telling friends...and we are not providing her with effective help’; NZ News, ‘Legal Support for Provocation Defence’ (2014) available at <http://www.radionz.co.nz/news/national/248211/legal-support-for-provocation-defence> accessed 25 October 2015.

Conclusions

The aim across all publications has been to provide optimal solutions for future reform where problems relating to the law as it applies to vulnerable offenders have been identified. The objective has been to provide a critical exposition of the problems vulnerable offenders face in claiming particular mental condition defences across specified jurisdictions, before presenting optimal pathways for future reform based upon the law and experiences within these criminal justice systems.

The aim of Part One was to investigate the extent to which the partial defences to murder are capable of accommodating the circumstances of those who are vulnerable as a result of mental ill health, and those who exhibit symptoms of co-morbidity. In doing so an in-depth review of the partial defences to murder as they apply to offenders who raise the spectre of co-morbidity across E&W, Scotland, NSW, NZ and the US was provided. The analysis revealed that a failure to appropriately legislate for this discrete category of offender has resulted in unnecessary litigation. This litigation could have been prevented if voluntary and transient states of voluntary intoxication were excluded from the partial defence, whilst ensuring partial defences are not excluded on grounds of alcohol dependence syndrome. The reform recommendations presented continue to provide avenues for future reform, particularly in light of the Law Commission's reform proposals on insanity and automatism.¹⁸⁵

The aim in Part Two was to examine the availability of insanity and automatism to the same category of offender, but with increased emphasis on the role of prior fault in precluding the availability of mental condition defences. Part Two provided a critical analysis of the insanity and automatism defences, and the interaction of mental condition defences with the doctrine of prior fault, with specific reference to the law in E&W, Scotland, Victoria and the US. The publications advanced an optimal template for future reform to the unacceptable approach the criminal law adopts in relation to intoxicated offending and offenders who exhibit symptoms of co-morbidity. The proposals advanced reject the construction of criminal liability based upon cognitive states of imputed recklessness. In terms of fair labelling, this framework would introduce a new offence of dangerous intoxication. The imposition of liability would be attached to the

¹⁸⁵ Considered in Part 2, above.

offender's responsibility for creating a dangerous situation, rather than cognitive states of imputed *mens rea*. In terms of the variety of scenarios that arise in the context of intoxicated offending, *dépeçage* standardisations, as outlined in (iv), ought to apply. In the context of medication non-compliance and co-morbidity, the Law Commission's recommended expansion of the problematic doctrine of prior fault was rejected, whilst the introduction of exclusionary clauses pertaining to intoxication *simpliciter* across mental condition defences was advanced. This reassessment provides a more balanced approach to reform.

The aim of Part Three was to scrutinise the extent to which loss of control (and equivalent provisions across selected jurisdictions) are available to primary victims who kill in response to family violence. The objective was to provide a detailed assessment of the application of the loss of control, provocation, extreme provocation, and (the former) defensive homicide defences as they apply to primary victims across E&W, Scotland, NSW, and the US. A common theme was identified across the jurisdictions considered; namely, a lack of understanding regarding the impact of familial abuse on the primary victim. The introduction of social framework clauses, tailored to the law within these jurisdictions, and modelled on the law in Victoria provides an optimal interim measure for reform. These reforms would complement the newly advanced mental condition defence models advanced in Part Four.¹⁸⁶

The aim of Part Four was to broaden the analysis in Part Three to determine the extent to which self-defence is available to the primary victim, in addition to addressing the difficulties associated with raising self-defence and loss of control simultaneously. Part Four delivered a detailed exposition of the availability of self-defence to the primary victim, and the legitimacy of reverting to a partial defence where self-defence fails. This detailed exposition of the law on mental condition defences demonstrates the inadequacy of the partial defences in cases involving the primary victim, and highlights a lack of consistency between the partial defences and self-defence. Two new partial defences are advanced to combat this issue based on self-preservation and fear of serious violence, which may be cogently aligned with self-defence. The need for reform is clear within all

¹⁸⁶ See also, Appendix F.

jurisdictions examined, but is most needed in NZ and Victoria where partial defences to murder have been abolished.¹⁸⁷

In the context of mental condition defences, a rebalancing exercise must take place, which ensures that vulnerable offenders are at the centre of discourse, policy, and reform initiatives, in relation to this sensitive area of the criminal law.¹⁸⁸ A recalibration of the aims of reform to mental condition defences, which focuses upon the vulnerable offender is required within these jurisdictions. A cultural shift needs to take place that recognises it is inappropriate to preclude mental condition defences to vulnerable offenders on the basis that unmeritorious claims may be made. Mental condition defences must be fit for purpose, meaning they are available to vulnerable offenders in appropriate cases, whilst being robust enough to prevent disingenuous claims. The options for optimal reform advanced demonstrate ways in which this might be achieved. In terms of intellectual originality, this work engages a shift in focus from unmeritorious offenders to vulnerable offenders who are often forgotten because of the ostensible contradiction in suggesting an individual who commits a violent crime is vulnerable. The publications represent an important advancement in the literature by illustrating not only how important it is to focus on vulnerable offenders, but how this can be achieved without running the risk of creating overly broad mental condition defences. The period of study, and very specific emphasis on vulnerable offenders at national and international level renders the work unique, and an essential point of reference with respect to mental condition defences.

Post-script: ethnography

This five-year-period has allowed me to develop my approach to research, to find my writing style, and to grow as an individual. The initial research question focused on the inter-relationship between partial defences and intoxication doctrine from an Anglo-American perspective. The emphasis shifted as the research highlighted a systematic failure to accommodate vulnerable offenders across identified jurisdictions. The comparative research proved particularly challenging,¹⁸⁹ as I familiarised myself with the

¹⁸⁷ A new framework was submitted to the NZ Law Com IP 39, 2015 (n 11); see, Appendix F.

¹⁸⁸ Cairns (n 12).

¹⁸⁹ For example, the US has several variants of diminished responsibility and diminished capacity, and those formalised variations have very little in common with section 2 of the Homicide Act 1957 (as amended by section 52 of the Coroners and Justice Act 2009).

relevant sources and approaches of relevant jurisdictions, it became easier to navigate the material. I was fortunate to be involved in the *Substantive Series in Criminal Law* from its inception, and have been supported by the editors. Together with the editors, we organised the first UK conference on the new partial defences to murder. This work provided the foundations for the research network I have developed. The research underpinned my organisation of over 20 national and international conferences and events. These events led to my appointment as Risk and Vulnerability Research Coordinator for the Centre; QMUL Fighting Femicide Network member; SLS Executive Committee member; Ross Parson's University of Sydney Fellow; Editorial board member for the *Journal of International and Comparative Law*; Scientific Committee member for the International Academy of Law and Mental Health; and, peer reviewer for the *International Journal of Law and Psychiatry*, and the *Journal of Criminal Law*. These roles and events have provided a catalyst for collaborative work, Law Commission responses, and contribution invites. I have collaborated with leading experts across the jurisdictions identified, and am indebted to them for their advice, support and friendship. The opportunity to learn from the research approach of others, particularly in co-authored projects, proved both challenging and incredibly rewarding. I recently returned from my first sabbatical; the time and space I had to reflect on the completed and current work, in addition to ideas for future research proved invaluable; importantly, I was able to visit the University of Sydney to work on my research and present my findings; this was the first time I had travelled and resided outside of Europe alone; the experience instilled greater self-confidence, and the immersion in Sydney's research culture allowed revisiting my research afresh. I am privileged to have had such a rich and diverse learning experience, and to be part of a dynamic, collegial and supportive research network. And, it does not end here. I am currently working on a co-authored publication that develops the response submitted to the New Zealand Law Commission Issues Paper; the article will be published in a special edition of the *Journal of International and Comparative Law*. Following publication, I intend to write an article on the position in South Australia in light of the recent Criminal Law Consolidation (Provocation) Amendment Bill 2015, with a view to publication in the *Sydney Law Review*.¹⁹⁰

¹⁹⁰ 11A—Limitation on defence of provocation. For the purposes of proceedings in which the defence of provocation may be raised, conduct of a sexual nature by a person does not constitute provocation merely because the person was the same sex as the defendant.

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Appendix A

(a) Adam Jackson, Natalie Wortley and Nicola Wake, 'Insanity and Automatism: A Response to the Law Commission Part 1' *Criminal Law and Justice Weekly* (2012) 176, 50, 731-733 (ISSN: 1759-7943).

(b) Adam Jackson, Natalie Wortley and Nicola Wake, 'Insanity and Automatism: A Response to the Law Commission Part 2' (2012) *Criminal Law and Justice Weekly*, 176, 51/52, 752-754 (ISSN: 1759-7943).

Criminal Law and Justice Weekly (formerly Justice of the Peace)/2012/Issue 50, December/Articles/Insanity and Automatism -- A Response to the Law Commission -- Part I - (2012) 176 JPN 731



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8 December 2012

Insanity and Automatism -- A Response to the Law Commission -- Part I

Process

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Adam Jackson, Natalie Wortley and Nicola Wake provide an overview of the insanity and automatism defences

On October 18, 2012, the Centre for Evidence and Criminal Justice Studies at the School of Law, Northumbria University, submitted a response to the Law Commission's scoping paper *Insanity and Automatism* (Law Com SP, 2012). The response followed a two-hour seminar hosted by the Centre, conducted under the Chatham House Rule. Those present at the seminar included: members of the judiciary (Circuit Judges, Recorders and a District Judge); practising barristers and solicitors (including members of the CPS); consultant psychiatrists; and academics from law and other disciplines.

The decision to take the relatively rare step of issuing a scoping paper can be explained on the basis of a lack of empirical data *vis-à-vis* the practical operation of the defences. Despite the "vast wealth of academic literature" (1.4) regarding the theoretical problems associated with the defences, the Law Commission noted:

"We have no data on how often the plea [of insanity] is considered by practitioners as a possibility or entered formally at trial. We have no data whatsoever on the use of the automatism defence." (1.5)

The aim of the paper was, therefore, "to discover how in the criminal law of England and Wales the defences of insanity and automatism are working, if at all" (1.1).

The Law Commission framed the paper as a series of 76 questions from which we identified key issues for discussion, including the relevance of insanity to prosecutors; definitional problems with the defence; difficulties with the label "insanity"; and disposal options following the special verdict. Part I of this article provides an overview of the two defences. Part II considers the difficulties associated with the practical application of the defences and outlines our response to the paper.

In most cases where mental disorder is in issue, the court will be required to consider whether the defendant is fit to plead. A defendant is unfit to plead if he lacks sufficient intellect to comprehend the course of criminal proceedings (*R. v. Pritchard* (1836) 7 C & P 30; *R. v. John M* [2003] EWCA Crim 3452). If the Judge determines that the defendant is unfit to plead, a jury will be empanelled to determine whether the defendant committed the *actus reus* of the offence (s.4 of the Criminal Procedure (Insanity) Act 1964). If the accused is considered fit to plead, the defences of insanity or automatism may be available. In murder cases the defendant may be eligible to plead diminished responsibility (considered below).

Insanity

The defence of insanity is a common law construct "founded on nineteenth century legal concepts which have not kept pace with developments in medicine and psychiatry" (1.3). To establish a defence of insanity, the defendant must prove that "at the time of the committing of the act, he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong" (*M'Naghten* rules (1843) 10 Cl & Fin 200, p.210).

The defendant's powers of reasoning must have been impaired at the time of the alleged offence. An inability to control emotions or resist impulses does not support the defence (*Kopsch* (1927) 19 Cr App R 50). Similarly, a momentary lapse of concentration does not constitute a defect of reason, even if caused by mental illness or mental disorder:

"The *M'Naghten* rules ... do not apply and never have applied to those who retain the power of reasoning but who in moments of confusion or absent-mindedness fail to use their powers to the full" (*Clarke* [1972] 56 Cr App R 225).

The defendant's defect of reason must have arisen from a "disease of the mind", a phrase which has been widely interpreted:

"The law is not concerned with the brain but with the mind, in the sense that 'mind' is ordinarily used, the mental faculties of reason, memory and understanding (...) the condition of the brain is irrelevant and so is the question of whether the condition of the mind is curable or incurable,

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transitory or permanent" (*Kemp* [1957] 1 QB 399).

Defendants have been regarded as being legally insane when suffering from conditions that would not constitute "mental disorder" under the Mental Health Act 1983, such as arteriosclerosis (*Kemp*); epilepsy (*Sullivan* [1984] AC 156); diabetes (*Hennessy* [1989] 2 All ER 9); and sleepwalking (*Burgess* [1991] 2 QB 92). The arbitrary effect of the internal/external factor delineation is such that a glycaemic condition will amount to insanity if it is caused by failing to take insulin but will amount to automatism if caused by taking an incorrect amount of insulin, or by taking insulin and then failing to eat (see further below, "Insanity or Automatism?"). The labelling of diabetics, epileptics and sleepwalkers as insane has been heavily criticized.

Indeed, in *Hennessey* and *Sullivan*, the defendants changed their pleas to guilty following rulings that their conditions amounted to insanity rather than automatism. There are concerns that the stigma attached to the label "insanity" deters defendants from relying upon the defence.

The final element that must be proved is that the defendant did not know the nature and quality of his act, or did not know that it was wrong. In *Codere* (1917) 12 Cr App R 21, the Court of Criminal Appeal held that "nature and quality" referred to the physical character of the act; it must be proved that the defendant "did not know what he was doing" (*Sullivan* [1984] AC 156, Lord Diplock). Reliance on the cognitive limb is uncommon because "it will be very rare indeed for a person with a relevant physical condition not to know the nature and quality of his or her actions" (2.38).

Alternatively, the defendant might argue that he did not know that his act was wrong in the sense that it was legally wrong (*Windle* [1952] 2 QB 826; *Johnson* [2007] EWCA Crim 1978). In *Windle*, the defendant killed his wife while suffering from *folie à deux*. Afterwards he asked police: "I suppose they will hang me for this?" The defence of insanity was unavailable because "it could not be challenged that the appellant knew that what he was doing was contrary to law ..." (p.834).

This narrow interpretation of the "wrongness" limb severely limits the ambit of the defence. As the Butler Committee pointed out:

"Knowledge of the law is ... a very narrow ground of exemption, since even persons who are grossly disturbed generally know that murder and arson are crimes." (*Report of the Committee on Mentally Abnormal Offenders* (Cmd 6244, 1975))

In *Johnson*, the Court of Appeal acknowledged that other jurisdictions have not followed the approach in *Windle* and that lower courts have sometimes approached the issue "on a more relaxed basis" (para.23). The court considered itself bound by *Windle* but observed that "there is room for reconsideration of the rules" (para.24).

Disposals

The disposal options available following a successful insanity plea or a finding that the defendant is unfit to plead are a hospital order (with or without a restriction order), a supervision order, or an absolute discharge (s.5 of the Criminal Procedure (Insanity) Act 1964, as amended). However, a hospital order can only be made if the court is satisfied based upon the evidence of two registered medical practitioners that the defendant is suffering from mental disorder of a nature or degree which makes it appropriate for him to be detained in hospital for medical treatment. The court must also be of the opinion that a hospital order is the most suitable method of dealing with the defendant (s.37 of the Mental Health Act 1983; s.5A of the 1964 Act, substituted by s.24 of the Domestic Violence, Crime and Victims Act 2004).

Automatism

Unlike the insanity defence, a successful automatism plea results in an outright acquittal. Lord Denning defined automatism as "an act done by the muscles without any control of the mind ... or an act done by a person who is not conscious of what he is doing" (*Bratty* [1963] AC 386, 401). The defence requires a "complete destruction of voluntary control" (*A-G's Reference (no.2 of 1992)* [1994] QB 91 105 (Lord Taylor CJ)). The defendant is required to satisfy the evidential burden and, if the prosecution subsequently fails to disprove automatism beyond all reasonable doubt, the defendant will be acquitted.

Insanity or Automatism?

As previously noted, the test of whether a condition is one of insanity or automatism is determined by

reference to whether the cause was internal or external, respectively. The rationale for the internal/external factor delineation is that involuntary conduct triggered by internal factors is more likely to recur than actions induced by external causes. The test was, therefore, designed as a form of "social protection" (Ashworth, *Principles of Criminal Law*, 4th ed, OUP, 2009, p.90). That protection is afforded by ensuring that an outright acquittal remains unavailable to the defendant whose condition is induced by internal factors.

The artificiality of the internal/external dichotomy is clearly demonstrated in cases involving diabetic defendants. Hennessy was charged with taking a motor vehicle without consent and driving whilst disqualified. He sought to rely on automatism on grounds that, at the time of the offence, he was suffering from stress, anxiety, depression and *hyperglycaemia*, as a result of forgetting to take insulin. Lord Lane CJ ruled: "stress, anxiety and depression can no doubt be the result of the operation of external factors, but they are not ... capable in law of causing or contributing to a state of automatism" (p.14). Furthermore, *hyperglycaemia* "caused by an inherent defect and not corrected by insulin is a disease, and if ... it does cause a malfunction of the mind ... the case may fall within the *M'Naghten* rules" (*ibid*).

In contrast, the defendant in *Quick* [1973] QB 910 raised the automatism defence when charged with an offence contrary to s.47 of the Offences Against the Person Act 1861. The defence argued that, at the material time, Quick was suffering from *hypoglycaemia* as a consequence of drinking spirits and consuming very little food after taking insulin. Lawton LJ considered that Quick's "mental condition ... was not caused by his diabetes but by his use of the insulin", which could be categorized as an external factor. The court further identified that, in cases where the defendant induces his own state of automatism (for example, through

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alcohol consumption), the rules relating to the defence are superseded by traditional intoxication doctrine.

The Law Commission highlights a similar problem with "psychological blow" cases (2.51). Although it was identified in *Hennessy* that reaction to stress, anxiety and depression is to be categorized as an internal factor, the court in *T* [1990] Crim LR 256 considered that an extremely shocking event (rape) resulting in post-traumatic shock disorder constitutes an external factor for the purposes of the automatism defence (see also *R. v. Narbrough* [2004] EWCA Crim 1012).

Diminished Responsibility

The problems associated with successfully pleading the insanity and automatism defences resulted in the implementation of the concessionary defence of diminished responsibility. The partial defence represented a relaxation of the "rigid dichotomy between sane or insane, responsible or not responsible, bad or mad" (Law Commission, *Partial Defences to Murder* (Law Com CP No.173, 2003), para.6.8). In order to reflect contemporary "developments in diagnostic practice", Parliament recently made significant revisions to the diminished responsibility plea in s.52 of the Coroners and Justice Act 2009, (Ministry of Justice, *Murder, Manslaughter and Infanticide* (MoJ CP No.19, 2008), para.49). The reformulated plea has the effect of reducing a murder conviction to one of voluntary manslaughter where the defendant suffers from an "abnormality of mental functioning" arising from a "recognized medical condition".

The jury must be satisfied that the medical condition substantially impaired the defendant's ability to (a) understand the nature of his conduct; (b) form a rational judgment; or (c) exercise self-control. Finally, the jury is required to assess whether the mental abnormality provides an explanation for the killing in that "it causes, or is a significant contributory factor, in causing the person to carry out that conduct" (Homicide Act 1957, s.2, as amended). The partial defence is easier to prove than insanity and for some defendants the prospect of a manslaughter verdict is preferable to a special verdict of not guilty by reason of insanity.

In Part I we have outlined the automatism and insanity defences by way of background. In Part II, we consider issues raised by the paper and provide an overview of the Centre's response.

To be concluded next week.

Criminal Law and Justice Weekly (formerly Justice of the Peace)/2012/Issue 52, December/Articles/Insanity and Automatism -- A Response to the Law Commission -- Part II - (2012) 176 JPN 752



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22 December 2012

Insanity and Automatism -- A Response to the Law Commission -- Part II

Process

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Adam Jackson, Natalie Wortley and Nicola Wake outline their response to the Law Commission's scoping paper

On October 18, 2012, the Centre for Evidence and Criminal Justice Studies at Northumbria University Law School submitted a response to the Law Commission's scoping paper *Insanity and Automatism* (Law Com SP, 2012). In Part I, (see, p.731 *ante*) we provided an overview of the defences. In this part of our article we outline the central tenets of the response submitted by the Centre.

The Law Commission raised a number of questions aimed at ascertaining how many persons in the criminal justice system suffer from mental disorders. Our members identified a limited amount of data available from the Northumbria and Teesside area as a result of ongoing projects aimed at diverting those with mental health problems from the criminal justice system (North East Offender Health Commissioning Unit (NEOHCU)).

The available data suggests that those with mental disorders constitutes 14 to 15 *per cent* of the total caseload of Newcastle Crown Court. Current statistics from the last quarter show that, of that number, 23 *per cent* have serious mental disorders and are referred to acute mental illness specialists; the other 77 *per cent* are dealt with by the court after assessment by the mental health team and with a follow up by nursing staff and/or secondary services where necessary. Anecdotal evidence suggests that those who could meet the criteria necessary for a successful plea of insanity are rare. Thus far under the scheme only two people have been identified as being potentially capable of satisfying the *M'Naghten* criteria but both individuals were "sectioned" from court under the Mental Health Act 1983. A far greater proportion of those with mental disorders are identified as potentially being unfit to plead (there are currently 35 cases before Newcastle Crown Court in which fitness to plead issues have been raised).

Decision to Prosecute

Another question raised by the paper was the extent to which the possibility that the accused will plead insanity or automatism should inform the decision to prosecute. Although our members felt that the possibility of such pleas should be considered, prosecutors observed that the information available at the charging stage is often inadequate and incomplete. As a consequence many defendants are charged before relevant issues (including mental disorder) are identified.

Our discussions highlighted that there is conflicting guidance available to the CPS when determining whether to charge in cases involving persons with mental disorders. The CPS *Guidance on Mentally Disordered Offenders* is based on Home Office circ.12/95, which states: "The existence of mental disorder at the time of the offence or the possible detrimental effect of prosecution on a person's mental health are factors tending against prosecution. But ... [t]he needs of the defendant must be balanced against the needs of society; if the offence is serious, it remains likely that a prosecution will be needed in the public interest" (para.14).

In contrast, the guidance set out in an earlier circ.66/90, places greater emphasis on the importance of having regard to the welfare of the accused when determining where the public interest lies. That both circulars remain in force exemplifies the lack of a clear and consistent approach to mental disorder in the criminal justice system. Furthermore, the CPS guidance states that prosecutors require information and evidence regarding mental health problems at the earliest opportunity. It appears that, in practice, such information is rarely available.

Definitional Problems

If the defendant is charged, our evidence suggests that the insanity defence is only considered as a last resort. Our members observed that, although mental disorder is an issue that is frequently raised in mitigation, the details are rarely explored in open court. Advocates tend to employ vague terms, such as "mental health problems" or "mental health issues", suggesting that a degree of stigma continues to be attached to mental disorder generally. A number of our members considered that the label "insanity" is particularly problematic. Some practitioners felt that it would be difficult to discuss "insanity" without causing offence and potentially

(2012) 176 JPN 752 at 753

a breakdown in the lawyer-client relationship. Furthermore, narrow interpretation of the term "defect of reason" and accordingly the inability to plead insanity in cases involving emotional/volitional conditions is outdated in terms of contemporary medical development and is difficult to reconcile with the revised Homicide Act 1957, s.2(1), (see, p.733 *ante*) which recognizes a range of emotional, behavioural and cognitive disorders.

This narrow construal is to be contrasted with the wide interpretation of the term "disease of the mind". We noted in Part I (see, p.732 *ante*) that the courts' preoccupation with the internal/external factor dichotomy has led to absurd results in practice. The Law Commission asked whether these problems might be remedied *via*

the introduction of a mental/physical cause test. We are of the opinion that this form of assessment would pose similar problems to those encountered under the current test. The present delineation is based on rather nebulous considerations. For example, many factors, both internal and external, can affect the blood sugar level of a person suffering from diabetes. Similar problems arise in post-traumatic stress disorder cases, where genetics, psychological, physical, and social factors contribute to the condition. In such cases, it remains unclear as to when/ whether an extremely shocking event will cease to operate as an external cause and be regarded as an internal factor as a result of more long-term psychological damage.

The fundamental problem in this area is that descriptions of medical conditions are not black and white; they are "usually catch-all categories that include many different underlying malfunctions" which readily cannot be categorized as physical or mental, internal or external -- there are infinite shades of grey (Kirsten Weir, "The roots of mental illness: How much of mental illness can the biology of the brain explain?", (2012) *Monitor on Psychology* 43 (6) 30). See also, *R. v. Petrolini* [2012] EWCA Crim 2055). Having a defence based upon inadequate legal definitions of these conditions will inevitably lead to interpretational difficulties and unsatisfactory results.

In response to questions concerning interpretation of the "wrongness limb", our members noted that, although the term is to be interpreted as meaning "legally wrong" (*Johnson* [2008] Crim LR 132), evidence suggests that psychiatrists understand the term in the wider sense of "moral wrongness". In practice, it will be rare that the defendant is unaware that what they are doing is "legally wrong" and, as such, it is almost impossible for a defendant to claim the defence using this limb if it is strictly applied. In relation to the "nature and quality limb", one of our members suggested that a defendant charged with murder might prefer to claim diminished responsibility where he "does not understand the nature of his conduct" (Homicide Act 1957, s.2(1A)(a) as amended). The concessionary defence is easier to establish and to some a manslaughter verdict is preferable to a special verdict.

The Trial Process

In terms of establishing the defence, the Law Commission asked whether the reverse burden of proof causes unfairness and/or it deters defendants from pleading insanity. Given that the insanity defence relies upon expert evidence, the imposition of a burden of proof upon the accused is arguably unavoidable. In order to satisfy a persuasive burden, the prosecution would need to have the accused examined by a psychiatrist. There is, at present, no means by which an accused person can be compelled to submit to a psychiatric examination and to introduce such powers would potentially breach art.8 of the European Convention on Human Rights (ECHR). In *H v. UK* (Application No.15023/89, unreported, April 4, 1990), the European Commission of Human Rights held that placing the burden of proof on the defendant to establish insanity did not violate the presumption of innocence so as to result in an unfair trial under art.6 of the ECHR. In *R. v. Lambert, Ali and Jordan* [2002] QB 1112, Lord Woolf CJ described incompatibility arguments based upon the reverse burden in cases of this type as "manifestly ill-founded" (para.19). The Scottish Law Commission also considered the incidence of the burden of proof in its report *Insanity and Diminished Responsibility* and concluded that "[p]lacing a legal burden of proving the defence can be a proportionate qualification to the rights of an accused person under art.6 provided that there are clear reasons for doing so" (Scottish Law Com, 2004, para.5.21).

The Law Commission was similarly concerned that the enhanced role of psychiatric evidence and the requirement to have a jury verdict may create difficulties in practice. Our members were of the view that the enhanced role of medical expert testimony in the trial process generally is a real concern. Jurors are required to choose between conflicting testimony delivered by experts in the field and often cases appear to be determined by which expert the jury prefers (see, for example, *R. v. Brown (Robert)* [2011] EWCA Crim 2796). There was some suggestion that the insanity defence could be more closely aligned with the law on fitness to plead; some of our members thought that it would be preferable for the trial Judge to have the authority to determine whether a defendant suffers from insanity, based upon psychiatric reports, rather than leaving the defence to the jury.

Disposal

In addition to the foregoing issues, the Law Commission asked for views as to whether the limited range of disposal options following a special verdict deters people from pleading insanity. Flexibility of disposal was introduced by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and our members felt that the range of disposals was no longer particularly "limited". As noted above, the number of defendants raising unfitness to plead is increasing, even though the same range of disposals is available following a finding of unfitness where the court is satisfied that the accused did the act or made the omission charged.

MacKay's research has identified a "gradual but steady rise in the number of [not guilty by reason of insanity] verdicts" and suggests that "the legislative changes contained in the 1991 and 2004 Acts are having an
(2012) 176 JPN 752 at 754

ongoing effect" (supplementary material to the scoping paper, Appendix E, E.5 and E.19). The introduction of sentences of imprisonment for public protection ("IPPs") (s.225 of the Criminal Justice Act 2003) may have contributed to this increase. In a serious case, a defendant who meets the *M'Naghten* criteria has a choice between risking an IPP following conviction and pleading not guilty by reason of insanity with the risk of a hospital order (with or without a restriction order attached). Practitioners observed that defendants fear IPPs more than any other type of sentence or disposal.

Conversely, some of our members felt that defendants may be deterred from pleading insanity by the risk that a hospital order may be imposed, preferring instead the more palatable fixed prison term. There appears to be no way to circumvent this difficulty, since, as, whatever label is attached to the defence, and however it is defined, a hospital order would inevitably have to be an available disposal option or sentence.

Conclusion

This article highlights a range of possible reasons for the low number of special verdicts. The consensus amongst our practitioner members was that the defence would consider fitness to plead before insanity. Our members also indicated that practitioners try to avoid the use of the insanity defence for reasons including: the difficulty of discussing the issue of insanity with a client; the fact that those potentially suitable for an insanity defence may be identified as unfit to plead or may otherwise be diverted from the criminal justice system; the low probability of success under the *M'Naghten* test; and the fact that, given the court can pass a hospital order following conviction just as it can following a special verdict, the "correct" result may be reached without recourse to a complex defence with a low probability of success.

It is hoped that a consultation period will further assist the Law Commission in clarifying the current scope of these defences, in order to inform any future reform recommendations. At present it is clear that the data concerning the ongoing use of these defences is severely limited. However, this may be due, in part, to the availability of other criminal justice initiatives (such as diversion projects and fitness to plead). A more holistic approach seems to be being adopted in relation to such initiatives and we think it essential that any reforms to the insanity defence are informed by the work that is ongoing in these areas.

Appendix B

Nicola Wake, 'Alcohol dependence syndrome and diminished responsibility' (2009)
Journal of Criminal Law 73(1) 17-21 (note).

Journal of Criminal Law

2009

Case Comment

Alcohol dependency syndrome and diminished responsibility

Nicola Wake

Subject: Criminal law

Keywords: Alcoholism; Diminished responsibility; Jury directions; Murder; Voluntary intoxication

Case: [R. v Wood \(Clive\) \[2008\] EWCA Crim 1305](#); [\[2009\] 1 W.L.R. 496 \(CA \(Crim Div\)\)](#)

***J. Crim. L. 17** Keywords Alcohol; Diminished responsibility; Voluntary manslaughter; Murder; Intoxication

The defendant (W), who suffered from alcohol dependency syndrome, had a strong craving for alcohol and would drink any that was available to him. After drinking continuously over a 48-hour period, and consequently in an extremely drunken state, he was invited to the deceased's (F) home where he fell asleep on the sofa. According to his own evidence W awoke to find F, who was openly homosexual, attempting to perform sexual acts upon him. W stated that he then lost his self-control and repeatedly struck F with a meat cleaver, killing him.

At his trial for murder before Wolverhampton Crown Court on 11 October 2006, W raised an evidential basis for the partial defences of both provocation and diminished responsibility. The partial defence ***J. Crim. L. 18** of diminished responsibility in s. 2 of the Homicide Act 1957 states: 'Where a person kills ... he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing ... the killing'. In relation to the defence, the evidence, *inter alia*, was that W suffered from alcohol dependency syndrome. This condition is an accepted psychiatric state and it has been found that where alcohol dependency syndrome does not result in brain damage it can produce changes in the brain which may impair judgement or cause loss of self-control.

In relation to the defence of diminished responsibility the judge directed the jury in two stages:

1. The initial direction addressed the possible relevance of brain damage consequent on alcoholism. The trial judge directed the jury that if they were satisfied that it was more likely than not that the defendant's responsibility for the killing was substantially reduced by reason of the alcohol dependency syndrome, it would be open to them to return a verdict of manslaughter.
2. In the second stage the trial judge considered the possibility that the defendant's alcohol dependency syndrome had caused him no brain damage. In this situation a verdict of manslaughter would be available to the jury if they deemed it more likely than not that the defendant's alcohol consumption was truly involuntary. In the context of involuntary consumption the trial judge made two points: (i) a man's act is only involuntary if he could not have acted otherwise; and (ii) an alcoholic who chooses to accept a drink after he has reached his normal quota should not be perceived as drinking involuntarily.

The jury rejected both partial defences and W was convicted of murder. W appealed, arguing that the jury had been misdirected in relation to diminished responsibility.

HELD, ALLOWING THE APPEAL, the court found that the two-stage direction to the jury had been based upon the test laid down in *R v Tandy* [1989] 1 All ER 267. This direction had been explained by Rose LJ in *R v Dietschmann* [2001] EWCA Crim 2052 as having established that drink is only capable of giving rise to a defence under s. 2 if it causes damage to the brain or produces an irresistible craving so that consumption is involuntary. The House of Lords later decision in *R v Dietschmann* [2003] 1 AC 1209 required a reassessment of the way in which *Tandy* had been applied. Whilst a jury would be more likely to conclude that the defendant suffers from an abnormality of the mind where brain damage has occurred, the absence of brain damage would not preclude the defence. Accordingly, the acute distinction between cases where brain damage has occurred as a result of

alcohol dependency syndrome and those where it has not is no longer appropriate.

With regard to the second stage of the direction the appellate court concluded that the trial judge had erred in two respects. When the judge **J. Crim. L. 19* stated that a man's act is only involuntary if he could not have acted otherwise, he effectively implied that there was no such thing as an irresistible craving. Similarly, stating that the defendant who chooses to accept a drink after he has reached his normal quota is not drinking involuntarily essentially directed the jury to accept that such a choice was voluntary, irrespective of whether it was made by an alcoholic. In context, this tacitly implied that unless every drink consumed by W that day was involuntary, his alcohol dependency syndrome was to be disregarded. The court in this case viewed such a position as being inconsistent with the House of Lords decision in *Dietschmann*. When asked to decide whether the defendant's mental responsibility was substantially impaired the jury should have been directed to focus, exclusively, on the effect of alcohol consumed as a result of the disease or illness and ignore the effect of alcohol consumed voluntarily. As a result, the murder conviction was quashed and a verdict of manslaughter on the grounds of diminished responsibility was substituted.

COMMENTARY

This case is the latest contribution to the plethora of authorities which have involved the misdirection of a jury in respect of alcohol dependency syndrome in the context of diminished responsibility. Establishing alcohol dependency syndrome as a condition which could be brought within the ambit of s. 2 was always going to be problematic. The underlying reason for this is that the general philosophy of criminal law has always been that criminal acts committed under the influence of self-induced intoxication are not for that reason excused, save in the context of specific intent offences, and denial of *mens rea* at the time of the relevant act: *R v Majewski* [1977] AC 443. The present case is perhaps indicative of a judicial reluctance to deviate from this established doctrine. Moreover, a consideration of past precedents appears to indicate that this legal recognition may have been significantly hindered by a broad misapplication of the legal principles distilled from the much earlier case of *R v Gittens* [1984] 3 WLR 327, CA.

The *Gittens* authority established that the task for the jury is to consider whether the abnormality of the mind, induced by disease or illness, substantially impaired the defendant's mental responsibility for his fatal acts despite the disinhibiting effect of the drink. Much of the controversy relating to the specimen jury directions deduced from *Gittens* appeared to centre upon Professor John Smith's commentary of the case (see [1984] Crim LR 554). Professor Smith had understood the aforementioned *Gittens* questions as: 'Have the defence satisfied you on the balance of probabilities--that if the defendant had not taken drink--(i) he would have killed as in fact he did? And (ii) he would have been under diminished responsibility when he did so?' Both *R v Atkinson* [1985] Crim LR 314 and *R v Egan* [1992] 4 All ER 470 had used adapted versions of these questions. Whilst it could be suggested that this was no more than a simple misapplication of the legal principles, it could be similarly contended that this demonstrated a judicial bulwark set against any liberal expansion of this concessionary defence. The present case **J. Crim. L. 20* certainly lends credence to such a suggestion since despite the House of Lords' recent clarification of the *Gittens* principles, the judge opted to apply the earlier and more restricted precedent of *Tandy*. Whatever the rationale, both *Atkinson* and *Egan* were erroneous on the basis that they failed to recognise that the abnormality of the mind and the effect of alcohol may each play a part in impairing the defendant's mental responsibility for the killing.

These erroneous decisions contributed to a widely held, yet misguided view, on the manner in which judges should direct the jury in relation to alcohol dependency syndrome. In relying upon the precedent of *Tandy* the judge in the present case erred in the same respect. The appellant (T), an alcoholic, strangled her 11-year-old daughter after consuming almost a whole bottle of vodka in preference to her customary drink. T was denied the defence of diminished responsibility on the basis that she had chosen to drink. Consequently it could not be said that her resultant abnormality of the mind was involuntarily induced by alcoholism. Chronic alcoholism could only amount to a disease of the mind if the repeated intake of intoxicants had damaged the brain or where the defence were able to establish that the alcoholism had reached a level where the appellant's drinking had become involuntary. The defence therefore extended to those who could resist the impulse to drink, but not those who could have abstained from it.

Whilst the decision in *Tandy* and the first instance judgment in the present case could be reconciled with the previous cases of *Atkinson* and *Egan*, they could not be reconciled with the earlier case of

Gittens and the more recent House of Lords decision in *Dietschmann* above. In *Dietschmann*, the defendant (D) had killed his victim by repeatedly punching and kicking him in the head. Charged with murder, D sought to rely on the partial diminished responsibility defence. The evidence suggested that whilst suffering from an abnormality of the mind D was also heavily intoxicated. Under the decision in *Tandy* the voluntary intoxication on the part of D would exempt him from the defence. In *Dietschmann*, however, the House of Lords reaffirmed the *Gittens* guidelines when it stated that the defence would be available to D if, after having established a disease of the mind, the jury were satisfied that despite the disinhibiting effect of the drink the defendant's mental abnormality substantially impaired his mental responsibility for the fatal acts. Thus, whilst the decision in *Dietschmann* required a reassessment of the law as it had been applied in *Tandy*, it had not introduced any *new law*. The case merely clarified the position in *Gittens*.

The decisions in both *Dietschmann* and the present case are evidently not the paradigm shift towards liberally extending this concessionary defence which on first blush they may appear. Traditionally *Gittens* had established the relevant legal principles necessary to bring alcohol dependency syndrome within the remit of diminished responsibility. It could perhaps be suggested that rather than confusion surrounding the application of *Gittens*, the cases of *Atkinson*, *Egan* and *Tandy* are evidence of an underlying reluctance to extend the partial defence. Moreover, the House of Lords' recent clarification in *Dietschmann* should have settled **J. Crim. L. 21* confusion surrounding the issue of alcohol dependency syndrome, yet the judge in this case chose to provide a restricted specimen jury direction. This extrapolation appears to be indicative of the courts' determination to control the possible expansion of the diminished responsibility defence. Nevertheless the binding decision in *Dietschmann* signifies that it is no longer appropriate to impose such arbitrary limitations. Moreover the Court of Appeal's recognition of this is perhaps reassuring as it suggests, theoretically at least, that in future it will be more difficult to obviate the principles ascribed in *Gittens* and reaffirmed in *Dietschmann*.

Nicola Wake

J. Crim. L. 2009, 73(1), 17-21

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Appendix C

(a) Nicola Wake, 'Diminished responsibility and acute intoxication: Raising the bar?' (2012) *Journal of Criminal Law* 76(3) 197-202 (note).

(b) Nicola Wake, 'Intoxication in the Dock; Specimen Directions for Jurors' (2010) *Journal of Criminal Law* 74(1) 16-20 (note).

(c) Nicola Wake, 'Diminished responsibility and murder: reconciling the mandatory life sentence with the evolution of criminal law?' (2009) *Journal of Criminal Law* 73(4) 300-304 (note).

Journal of Criminal Law

2012

Case Comment

Diminished responsibility and acute intoxication: raising the bar?

Nicola Wake

Subject: Criminal law

Keywords: Defences; Diminished responsibility; Murder; Voluntary intoxication

Legislation: [Coroners and Justice Act 2009 s.52](#)

[Homicide Act 1957 s.2](#)

Case: [R. v Dowds \(Stephen Andrew\) \[2012\] EWCA Crim 281; \[2012\] 1 W.L.R. 2576 \(CA \(Crim Div\)\)](#)

***J. Crim. L. 197** Over the weekend of 19-21 November 2010, Dowds (D) fatally stabbed his partner after having consumed vast quantities of alcohol. According to his evidence, both were habitual binge drinkers and there had been a long history of violence between them, mostly initiated by her, and usually when one or both had been drinking. The facts suggest that the fatal argument took place in the early hours of Saturday 20 November because the victim made an interrupted 999 call at that time. On the ***J. Crim. L. 198** evening of Sunday, 21 November, D telephoned the police to report that his partner was dead. D asserted that he had no recollection of the events which led to the death of the victim, but he did not dispute that he must have been responsible for her wounds.

At his trial for murder, the jury were required to consider whether, in light of the intoxication, D had been capable of forming the requisite intention to kill or cause serious bodily harm. The trial judge also left the loss of control defence, under ss 54-56 of the Coroners and Justice Act 2009 ('the 2009 Act'), to the jury. Section 54(1)(a) and (7) of the 2009 Act reduces a conviction of murder to one of voluntary manslaughter where the defendant kills subject to a loss of control; the loss of control must be attributable to at least one of two qualifying triggers. The first qualifying trigger is satisfied by a thing said or things done or said (or both), which constituted circumstances of an extremely grave character, and caused D to have a justifiable sense of being seriously wronged (the 'seriously wronged' trigger). The second qualifying trigger requires D to fear serious violence from V against D or another identified person (the 'fear' trigger) (2009 Act, s. 54(1)(b) and s. 55(3),(4)(a)-(b), (6)(c)). The jury were required to determine whether D had lost his self-control, as a result of an attack by the victim, which caused him to fear serious violence.

At the outset of the trial Wait J ruled that *transient* acute intoxication is insufficient to raise the partial defence of diminished responsibility under the revised parameters of s. 2 of the Homicide Act 1957 ('the 1957 Act'). For the purposes of the partial defence, it was not contended that D was an alcoholic or clinically dependent on drink. He was a heavy but elective drinker. He held down a responsible occupation which required him to be alert and clear-thinking. D was convicted of murder before Wolverhampton Crown Court after the jury rejected the loss of control defence and concluded that D had intended to cause serious bodily harm.

D appealed on the ground that the diminished responsibility defence should have been left to the jury. Counsel for the defence argued that the amendments made to s. 2 of the 1957 Act (by s. 52 of the 2009 Act) mean that voluntary intoxication may now give rise to the concessionary defence and thus reduce a murder conviction to one of voluntary manslaughter. The defence's argument was that s. 2(1) of the 1957 Act (as amended) requires that at the time of the killing the defendant must have been suffering from an 'abnormality of mental functioning' arising from a 'recognised medical condition'. The ICD-10 contains at F10.0, the condition of 'Acute Intoxication'. Acute intoxication is, therefore, a 'recognised medical condition'; that is the condition in which D was in when he killed the victim. Intoxication involves an impairment of mental functioning and it might well, depending on the facts, affect D's ability to understand the nature of his conduct, form a rational judgement and/or exercise self-control. Accordingly, the diminished responsibility defence ought to have been left to the jury (at [33]).

HELD, DISMISSING THE APPEAL, voluntary acute intoxication, whether from alcohol or an alternative substance, is not capable of founding **J. Crim. L. 199* diminished responsibility. This is in line with the position prior to the 2009 Act reforms (*R v Fenton* (1975) 61 Cr App R 261; *R v Dietschmann* [2003] UKHL 10; *R v Wood* [2008] EWCA 1305; *R v Stewart* [2009] EWCA Crim 593). The defendant's argument is counter to the established principle that voluntary intoxication is not a defence, save upon the limited question of whether a 'specific intent' has been formed. Hughes LJ referred to the speeches of Lord Elwyn-Jones LC and Lord Edmund-Davies in *DPP v Majewski* [1977] AC 443:

Although there was much reforming zeal and activity in the 19th century, Parliament never once considered whether self-induced intoxication should be a defence generally to a criminal charge. It would have been a strange result if the merciful relaxation of a strict rule of law had ended, without any Parliamentary intervention, by whittling it away to such an extent that the more drunk a man became, provided it stopped short of making him insane, the better chance he had of an acquittal ... The common law rule still applied but there were exceptions to it ... [defined] by reference to specific intent. (Lord Elwyn-Jones LC (at 471H) and Lord Edmund-Davies (at 494F) in *DPP v Majewski* [1977] AC 443, approved of Lawton LJ's ruling in the Court of Appeal)

Accordingly, their Lordships ruled that had Parliament intended to alter the law on voluntary intoxication it would undoubtedly have made this intention explicit (at [35]). It was not possible to infer such an intention from the adoption in the new formulation of the expression 'recognised medical condition' (ibid.). Parliament 'did not include writing the terms of the ICD-10 and/or DSM-IV into the legislation' (ibid.) because of 'the divergence between the *level* of impairment which may bring a patient within a DSM-IV classification and the level necessary to have legal impact' (at [30]). The WHO ICD-10 is 'primarily a diagnostic tool for doctors and a statistical tool for public health professionals' (at [29]). The DSM-IV is designed to 'provide a guide for clinical practice' (at [30]). The introduction to the DSM-IV provides that 'in most situations, the clinical diagnosis of a mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder", "mental disability", "mental disease" or "mental defect"' (ibid.). As such, a number of conditions which are included within these classificatory systems 'raise important additional legal questions when one is seeking to invoke them in a forensic context' (at [31]). Accordingly, the presence of a 'recognised medical condition' is a necessary, but not always a sufficient condition to raise the issue of diminished responsibility (at [40]). On these grounds voluntary acute intoxication does not give rise to the partial defence. The fact that D's condition was a transitory or temporary one was a relevant factor. However, that does not rule out the possibility that there may be genuine recognised medical conditions, which although temporary, might fall within the ambit of s. 2 of the 1957 Act.

COMMENTARY

The decision in the present case should be contrasted with the earlier case of *Clinton* noted above (pp. 193-7). The key question in the present case was whether acute intoxication per se is a suitable ground to claim **J. Crim. L. 200* the diminished responsibility defence under the revised parameters of s. 2 of 1957 Act. Prior to the enactment of the 2009 Act, both the House of Lords and Court of Appeal concluded that acute intoxication per se was incapable of satisfying the diminished responsibility plea (*R v Fenton* (1975) 61 Cr App R 261; *R v Dietschmann* [2003] UKHL 10; *R v Wood* [2008] EWCA 1305; *R v Stewart* [2009] EWCA Crim 593). This was because acute intoxication could not constitute an 'inherent cause' nor was it a condition of arrested or retarded development, disease or injury (1957 Act, s. 2).

The appellant in the present case contended that voluntary acute intoxication may satisfy the newly ordered diminished responsibility plea since acute intoxication is a recognised medical condition for the purposes of the ICD-10 (at [33]). To raise the revised plea successfully, the defendant must now prove, on the balance of probabilities, that at the time of the killing he was suffering from an 'abnormality of mental functioning' arising from a 'recognised medical condition' (2009 Act, s. 52(1)(a)). This terminology replaced the Law Commission's original 'underlying condition' mandate which would have required the defendant to have been suffering from 'a pre-existing mental or physiological condition other than that of a transitory kind' (Law Commission, *Partial Defences to Murder*, Law Com. Report No. 290 (2004) paras 1.17 and 5.97). The 'underlying condition' requirement would have impliedly excluded extreme drunkenness from satisfying the diminished responsibility plea since it is described in the ICD-10 as a temporary 'condition that follows administration of psychoactive substances resulting in disturbances in levels of consciousness,

cognition, affect or behaviour, or other psycho-physiological functions and responses' (World Health Organisation, *ICD-10*, 'Mental and Behavioural Disorders Due to Psychoactive Substance Abuse', ch. V, F10-F19 available at <http://apps.who.int/classifications/apps/icd/icd10online/>, accessed 10 April 2012). Accordingly, the change in terminology suggests that transient conditions may satisfy the partial defence (at [39]).

In stark contrast, the 'recognised medical condition' requirement was, as their Lordships identified, designed to 'encourage reference within expert evidence to diagnosis in terms of one or two of the internationally [recognised] classificatory systems of mental disorders (WHO ICD10 and AMA DSM)' (at [28], evidence from the Royal College of Psychiatrists quoted by the Law Commission in *Murder, Manslaughter and Infanticide*, Law Com. Report No. 304 (2006) para. 5.114). The above definition, taken from the ICD-10, identifies acute intoxication as a 'recognised medical condition' and, therefore, extreme drunkenness *potentially* satisfies that aspect of the concessionary defence; see N. Wake, 'Recognising Acute Intoxication as Diminished Responsibility? A Comparative Analysis' (2011) 76 JCL 71 at 73-4. This argument is clearly outwith the scope of traditional intoxication doctrine per se which establishes that voluntary intoxication does not negate the defendant's criminal liability, save in the limited context of specific intent offences and operatively as a denial of the requisite *mens rea* at the time of the relevant act (*R v Majewski* [1977] AC 443; A. Simester, 'Intoxication Is *J. Crim. L. 201 Never a Defence' [2009] Crim LR 3; S. Gardner, 'The Importance of *Majewski*' (1984) 4 *Oxford Journal of Legal Studies* 279; J. Horder, 'Pleading Involuntary Lack of Capacity' (1993) 52 CLJ 298). The Court of Appeal, therefore, concluded that 'voluntary acute intoxication, whether from alcohol or other substance, is not capable of founding diminished responsibility' (at [41]). Their Lordships noted that 'the presence of a "recognised medical condition" is a necessary, but not always a sufficient, condition to raise the issue of diminished responsibility' (ibid.). The effect is to imply that in certain cases the defendant will be required to prove *something* beyond a 'recognised medical condition' before he or she may satisfy that aspect of the partial defence. However, the Court of Appeal provided no further guidance in relation to this implicit requirement.

The decision to exclude acute intoxication per se from satisfying the partial defence is unsurprising. However, the issue in the present case could have been circumvented had Parliament explicitly excluded acute intoxication from the concessionary defence. This is the position under s. 51B(3) of the Criminal Procedure (Scotland) Act 1995, as inserted by s. 168 of the Criminal Justice and Licensing (Scotland) Act 2010, which provides:

The fact that a person was under the influence of alcohol, drugs or any other substance at the time of the conduct in question does not of itself--

(a) constitute abnormality of mind for the purposes of subsection (1), or.

(b) prevent such abnormality from being established for those purposes.

The provision is designed to prevent the acutely intoxicated defendant from successfully claiming diminished responsibility, unless that intoxication co-existed with an additional medical condition (Scottish Law Commission, *Report on Insanity and Diminished Responsibility*, Cm 195 (2004) para. 3.39). This approach is in line with the English position prior to the 2009 Act reforms (see *R v Dietschmann* [2003] UKHL 10; *R v Wood* [2008] EWCA 1305; *R v Stewart* [2009] EWCA Crim 593).

Notwithstanding these principles, an exclusionary clause as elucidated above, would not detract from the fact that the 'recognised medical condition' requirement in the revised diminished responsibility plea is simply too broad. The Court of Appeal noted that the international classificatory systems identify an array of 'disorders' (for example, the ICD-10 includes, 'unhappiness' (R45.2), 'irritability and anger' (R45.4), 'suspiciousness and marked evasiveness' (R46.5), 'pyromania' (F63.1), 'paedophilia' (F65.4), 'sado-masochism' (F65.5) and 'kleptomania' (F63.2)). The DSM-IV includes, 'exhibitionism' (569), 'sexual sadism' (573) and 'intermittent explosive disorder' (663/667), which raise important legal questions for the courts (at [31]). Although these systems were not explicitly written into the statutory formula, the rationale for including the 'recognised medical condition' requirement was 'to ensure a greater equilibrium between the law and medical science' (*R v Brown (Robert)* [2011] EWCA Crim 2796 at [23]; Law Commission, *Murder, Manslaughter and Infanticide*, Law Com. Report No. 304 (2006) para. *J. Crim. L. 202 5.114). The idea that the courts will be required to determine which recognised medical conditions are valid for the purposes of the partial defence is inimical to this aim.

The antithetical rulings in *Clinton* and the present case are indicative of the inherent problems associated with tautological and imprecise legislative drafting. Their Lordships in *Clinton* adopted a

remarkably inclusionary approach to sexual infidelity in the context of ss 54-56 of the 2009 Act, which the Court of Appeal considered to be consistent with 'the views expressed in Parliament by those who were opposed in principle to the enactment of s. 55(6)(c)' (*R v Clinton* [2012] EWCA Crim 2 at [40]). In the present case, the exclusionary approach to acute intoxication (and other recognised medical conditions above) may have raised the bar for future diminished responsibility claims. If *Clinton* and the present case are representative of the judgments that we are to expect in the wake of the 2009 Act, it may well be that the new provisions will prove more problematic than their predecessors.

Nicola Wake

J. Crim. L. 2012, 76(3), 197-202

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Journal of Criminal Law

2010

Case Comment

Intoxication in the dock: specimen direction for jurors

Nicola Wake

Subject: Criminal law

Keywords: Alcoholism; Diminished responsibility; Jury directions; Murder

Case: [R. v Stewart \(James\) \[2009\] EWCA Crim 593; \[2009\] 1 W.L.R. 2507 \(CA \(Crim Div\)\)](#)

***J. Crim. L. 16** Keywords Alcohol dependency syndrome; Alcoholism; Diminished responsibility; Jury directions; Murder

The appellant (S) was convicted of murder before the Crown Court at Blackfriars after the jury rejected the partial defence contained within s. 2(1) of the Homicide Act 1957. Three constituent elements are contained within the section: (1) at the time of the killing the defendant must have been suffering from an abnormality of the mind; (2) the abnormality of the mind must have arisen from a condition of arrested or retarded development of the mind or any inherent causes, or must have been induced by disease or injury; and (3) the abnormality of the mind must have substantially impaired the defendant's mental responsibility for his acts or omissions in the commission of the fatal offence.

S had been drinking heavily in the 10 days leading up to the killing and particularly heavily on that day. In the early evening of 29 August 2006 the deceased struck the appellant, causing a laceration across his nose and bleeding under his eye. Much later that night the appellant subjected the deceased to an attack of extreme violence which resulted ***J. Crim. L. 17** in fatal injuries. There were numerous blunt force impacts as well as injuries to the deceased's head caused by a sharp jagged object. His body was found in the early hours. The cause of death was brain damage and blood loss.

It was contended that S had been for many years and was at the time of the killing a chronic alcoholic. Medical experts called for both S and for the Crown unanimously agreed that at the time of the killing the appellant suffered from alcohol dependency syndrome which had not produced brain damage. There was dispute, however, as to the effect of that syndrome on S's responsibility for his actions. The medical expert for the defence was of the view that the alcohol dependency syndrome, from which S suffered, constituted an abnormality of the mind which substantially impaired his responsibility for the killing. The medical expert on behalf of the Crown adduced that, however chronic the alcoholism, an alcoholic always had a choice whether to drink at all, and if he did, in the amount that he drank.

HELD, ALLOWING THE APPEAL AND ORDERING A RETRIAL, the abnormality of the mind must have arisen from a condition of arrested or retarded development or any inherent causes, or it must have been induced by disease or illness. In cases where the alcohol dependency syndrome results in brain damage it would arguably be easy for the jury to conclude that the defendant falls within s. 2(1) of the 1957 Act. Where it does not, the interrelationship between alcohol dependency syndrome and the partial defence of diminished responsibility becomes significantly more complex.

The judge had artificially restricted the guidelines derived from the earlier case of *R v Tandy* (1988) 152 JP 453 where Watkins LJ said that:

for a craving of drink in itself to produce an abnormality of the mind, induced by the disease of alcoholism, the alcoholism had to have reached such a level that the brain was damaged, or the craving had to be such as to render the defendant's use of the drink involuntary because she could no longer resist the impulse to drink.

Accordingly, if it could be proved that the defendant's first drink of the day was voluntary, she would be precluded the partial defence.

This case was indistinguishable from the first instance direction in *R v Wood (Clive)* [2008] EWCA Crim 1305, [2009] 1 WLR 496, and for the same reasons set out in that case, the judge had

misdirected the jury.

Their Lordships therefore deemed it appropriate to outline the manner in which judges in future cases should direct juries where the abnormality of the mind is inextricably linked to alcohol consumption. The impact is to create a three-part test in order to determine whether the alcohol dependency syndrome falls within s. 2 of the Homicide Act 1957. The jury should be directed to decide:

1. Whether the defendant was indeed suffering from an abnormality of the mind at the time of the killing: *R v Byrne* [1960] 2 QB 396. A finding of alcohol dependency syndrome will not necessarily mean that the defendant has established the requisite abnormality **J. Crim. L. 18* of the mind. This depends on the jury's findings pertaining to the nature and extent of the syndrome, and whether, in a wider context, his consumption of alcohol before the killing is fairly to be regarded as the involuntary result of an irresistible craving or compulsion to drink.

2. Whether that abnormality of the mind was induced by disease or illness.

3. Assuming the above two questions are answered in the affirmative, directions about whether the defendant's mental responsibility for what he did was substantially impaired should be addressed in conventional terms. The jury should be assisted with the concept of substantial impairment, and may be properly invited to reflect on the difference between a failure by the defendant to resist his impulses to behave as he actually did, and an inability consequent on it to resist them.

In answering the questions, the jury should be directed to consider all the evidence including the opinions of the medical experts. The issues likely to arise in this kind of case and on which they should be invited to form their own judgment will include:

1. the extent and seriousness of the defendant's dependency, if any, on alcohol;
2. the extent to which his ability to control his drinking or to choose whether to drink or not, was reduced;
3. whether he was capable of abstinence from alcohol; and, if so,
4. for how long; and
5. whether he was choosing for some particular reason to decide to get drunk or to drink even more than usual.

COMMENTARY

The defence of diminished responsibility has always raised complex and difficult issues for the jury and a decision in cases of this context will rarely be straightforward. This is especially true in cases where the underlying mental disorder is related to alcohol consumption.

For many years the extrapolation of case precedents indicated that the accused would have to argue that the alcohol had injured his mind. Accordingly, the defendant who was simply under the influence of alcohol or narcotics at the time he committed the offence would not be covered. More recently, however, Lord Hutton conjectured the correct analysis to apply in cases involving evidence of both mental disorder and intoxication. In *R v Dietschmann* [2001] EWCA Crim 2052, Lord Hutton asserted that the appropriate direction to juries in such cases was not whether the defendant would have carried out the killing in the absence of intoxication, but whether, if he did kill, he killed under diminished responsibility. Accordingly, the House of Lords made it clear that evidence of intoxication on the part of the defendant does not preclude the defence.

Subsequently, in *Wood* above, the Court of Appeal attempted to apply the reasoning in *Dietschmann* to a case involving a defendant whose **J. Crim. L. 19* underlying mental condition is itself related to alcohol abuse. In the leading judgment Sir Igor Judge P stated:

In our judgment, *R. v. Dietschmann* requires a reassessment of the way in which *R. v. Tandy* is applied in the context of alcohol dependency syndrome where observable brain damage has not occurred. The sharp effect of the distinction drawn in *R. v. Tandy* between cases where brain damage has occurred as a result of alcohol dependency syndrome and those where it is not, is no longer appropriate. Naturally, where brain damage has occurred the jury may be more likely to conclude that the defendant suffers from an abnormality of mind induced by disease or illness, but whether it has occurred or not, logically consistent with *R. v. Dietschmann*, the same question (ie, whether it has

been established that the defendant's syndrome is of such an extent and nature that it constitutes an abnormality of mind induced by disease or illness) arises for decision. This is for the jury. ([2008] EWCA Crim 1305 at [41])

Their Lordships in *Wood* asserted that the jury should 'focus exclusively on the effect of alcohol consumed by the defendant as a direct result of his illness or disease and ignore the effect of any alcohol consumed voluntarily' ([2008] EWCA Crim 1305 at [41]). The words 'and ignore the effect of any alcohol consumed voluntarily' may appear to require the jury to 'separate out' each and every drink consumed by the defendant in order to decide whether the consumption was voluntary or involuntary. This would be unrealistic, when, at some levels of severity, what may appear to be 'voluntary' drinking may be inseparable from the defendant's underlying syndrome.

It is arguably unsurprising that the Crown viewed the present case as an opportunity to provide further guidance to juries pertaining to the concessionary defence where the only basis for the alleged abnormality of the mind arose from alcohol dependency syndrome without discernible brain damage. In cases such as the present one and that of *Wood*, juries will be called upon to answer questions relating to the operation of the mind on which they would be unfamiliar. This unenviable task is made even more difficult by virtue of the fact that juries will be relying on medical expert evidence from professionals who are required to address questions in legal and not medical terms. In reality, however, this three-tier threshold test will arguably do little to assist in determining when the concessionary defence will be available. The jury will inevitably be required to make the necessary judgments not just on the basis of expert medical opinion, but also by using their collective common sense and insight into the practical realities which underpin each individual case: *R v Byrne* [1960] 2 QB 396. In practical terms it is often more a question of which medical expert the jury find more convincing--the defence or the Crown.

Nevertheless, one of the recurring problems identified in such cases is that judges consistently give inaccurate directions to jurors in relation to the partial defence. Accordingly, the guidelines in *Wood* and the present case will only be of assistance to the jury if they are applied correctly by the judiciary. Whether the reaffirmation of those principles in *Dietschmann* and *Wood* combined with their extension in the present case will **J. Crim. L. 20* mitigate the issues associated with specimen jury directions remains to be seen. Seemingly, however, the unenviable decision that jurors face should be made much less arduous if they are given clear guidelines at the outset.

Nicola Wake

J. Crim. L. 2010, 74(1), 16-20

Journal of Criminal Law

2009

Case Comment

Diminished responsibility and murder: reconciling the mandatory life sentence with the evolution of criminal law?

Nicola Wake

Subject: Sentencing

Keywords: Diminished responsibility; Life imprisonment; Manslaughter; Sentencing

Legislation: [Criminal Justice Act 2003 \(c.44\) s.225, Sch.21](#)

Case: [R. v Wood \(Clive\) \[2009\] EWCA Crim 651; \[2010\] 1 Cr. App. R. \(S.\) 2 \(CA \(Crim Div\)\)](#)

***J. Crim. L. 300** Keywords Criminal Justice Act 2003; Custodial sentence; Murder; Manslaughter; Mandatory sentence

After drinking heavily over a 48-hour period, and consequently in an extremely drunken state, the appellant (W) was provided accommodation by the deceased (F). F was openly homosexual and W fully appreciated F's sexual orientation before he joined the deceased at his home. According to W, he awoke to find F making unwelcome homosexual advances to him; thereupon he had lost his self-control and hit the victim repeatedly with a meat cleaver causing death.

The appellant was convicted of murder before Wolverhampton Crown Court after the jury rejected the partial defence of diminished responsibility under s. 2(1) of the Homicide Act 1957. Although the medical experts were unanimous in their opinion that W did suffer from alcohol dependency syndrome there was considerable dispute as to ***J. Crim. L. 301** whether the alcohol consumed by W had been completely 'involuntary'. As a result, W was sentenced to life imprisonment and the minimum term to be served was fixed at 18 years.

On appeal, the appellant successfully argued that the judge's direction to the jury on the meaning of 'involuntary' had contradicted the House of Lords decision in *R v Dietschmann* [2003] 1 AC 1209, where it was identified that the primordial question for the jury in such cases is not whether the first drink was involuntary but whether 'the defendant has satisfied you that, despite the effect of the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts?'. On 20 June 2008, the verdict of murder was quashed and a conviction of manslaughter was substituted on grounds of diminished responsibility, pursuant to s. 2(1) of the Homicide Act 1957 (see *R v Wood (Clive)* [2008] EWCA Crim 1305, (2009) 73 JCL 17, commentary N. Wake).

The prosecution did not seek a retrial and so it fell to a differently constituted Court of Appeal to sentence the appellant. The Court of Appeal noted that in determining sentencing in cases involving diminished responsibility two considerations were relevant:

1. In the absence of any medical disposal, the first issue was whether the case required a sentence of imprisonment for life under s. 225(2) of the Criminal Justice Act 2003 ('the 2003 Act'), or imprisonment for public protection under s. 225(3) of the 2003 Act, as amended by the Criminal Justice and Immigration Act 2008.

2. If either sentence was necessary, the minimum term to be served by W had to be assessed. It was submitted for the defendant that, in manslaughter cases, culpability rather than harm should be the primary consideration in determining the sentence, in accordance with s. 143(1) of the 2003 Act.

HELD, IMPOSING A SENTENCE OF LIFE IMPRISONMENT, the mere fact that the case was one of manslaughter on the grounds of diminished responsibility did not preclude a sentence of imprisonment for life. Under s. 225(2) of the 2003 Act, '(a) if the offence is one in respect of which the offender would ... be liable to imprisonment for life, and (b) the court considers that the seriousness of the offence is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life'. In reality, this sentence will be rare, usually reserved for particularly grave cases, where the defendant's responsibility for his actions, although diminished,

remains high.

Once a sentence of life imprisonment was passed, it was then necessary to consider the tariff. Schedule 21 to the 2003 Act provides a range of suggested minimal custodial sentences to which the court should have regard. This indicates that, in homicide cases, although the *result*, the death of the victim is identical, the gravity of each individual offence is not. Accordingly, a consideration of either culpability or harm should not be paramount nor should they be exclusive when determining sentence. Where diminished responsibility is established it serves merely **J. Crim. L. 302* to reduce the defendant's culpability for his actions in the killing; the remaining circumstances of the homicide are left unchanged.

The salient feature of this offence was not simply that F had been killed, but that he had been killed in the course of a sustained attack of repeated ferocity. The suggested levels of sentence in Sched. 21 represented the time actually to be spent in custody and the court was of the opinion this was not yet clearly understood. Accordingly, a sentence of 30 years' imprisonment was the equivalent of a determinate sentence of 60 years' imprisonment. A significant difference between sentences for murder and sentences for manslaughter, which were often close to murder, would be inimical to the administration of justice. This means that the actual sentences imposed in cases of diminished responsibility manslaughter decided before the 2003 Act came into effect should be treated with the utmost caution.

At the original trial, the judge decided that the sentence for murder should have been one of a minimum tariff of 18 years and the court found no reason to disagree with this suggestion. The tariff then had to be reduced to take account of the reduced culpability through diminished responsibility, but this was a grave attack and one where the offender had a high degree of culpability. Bearing in mind the protection of public concern, the minimum sentence is fixed at 13 years.

COMMENTARY

This case may be viewed as atypical; the partial defence of diminished responsibility applies, but a sentence of life imprisonment was still imposed. Murder is recognised as the gravest crime in the legal system, justifying the severest punishment, a mandatory life sentence. Murder is committed when a defendant unlawfully kills another person with an intention to kill or an intention to do serious harm. It includes, *inter alia*, premeditated assassinations, serial or sexual killings, but also includes far less culpable killings such as euthanasia which can be carried out in an act of compassion and the abused woman who kills her abuser through fear of further violence. Notwithstanding, the context of the killing these individuals will all be subject to the same mandatory sentence of life imprisonment unless a partial or full defence applies.

In cases where the partial defence of diminished responsibility can be established, and a conviction of manslaughter substituted the trial judge has substantial discretion in relation to sentencing. The killing remains intentional but the material facts become an element of consideration at the sentencing stage. In the present case, W's level of activities before the attack began and after its conclusion revealed evidence of planning and preparation. The main weapon used in the attack on the deceased, the meat cleaver, was taken to F's flat. Despite normally carrying the weapon in a rucksack W, at some point, removed the meat cleaver and concealed it within his jacket. The post-mortem report evidenced extensive external injuries, consistent with having been caused by a meat cleaver and a lump hammer. Police investigations linked both weapons to W. These investigations further revealed steps W had taken to conceal his crime after he had committed the fatal act. Moreover, at police **J. Crim. L. 303* interview W stated that he 'hated gays', but later attempted to pass this off as words spoken in the confusion surrounding his arrest. Evidently, this case highlights a situation where specific features of homicide are common to both murder and manslaughter. W's culpability had been diminished, but it was far from extinguished.

In determining whether to impose a discretionary life sentence or imprisonment for public protection, the Court of Appeal relied on the authority of *R v Chambers* (1983) 5 Cr App R (S) 190. In *Chambers*, the appellate court had to consider the propriety of the imposition of a 10-year sentence on a defendant (C). C had removed his mother-in-law from her house via subterfuge before effecting an entry and stabbing his wife 23 times in the presence of their child. Medical evidence showed that at the time of the killing C was suffering from an anxiety-depressive state. The trial judge accepted that this substantially impaired C's mental responsibility for his actions in the commission of the offence. C was sentenced to life imprisonment with a determinate period of 10 years. Upon appeal it was

established that, in determining sentence, the court must have regard to two factors:

1. the degree of the defendant's responsibility for his actions; and
2. the period of time, if any, for which the accused would continue to be a danger to the public.

The only factor which should influence whether the sentence should be imprisonment for life ought to be the seriousness of the offence. In *Chambers*, as with the present case, the facts indicated a considerable degree of preparation. This suggested that C retained a substantial degree of responsibility for his acts, notwithstanding evidence of the partial defence. On this basis, the Court of Appeal reaffirmed the trial judge's approach to sentencing, but reduced the determinate period to eight years' imprisonment.

These principles were recently reinforced in the case of *R v Kehoe* [2009] 1 Cr App R (S) 9. In *Kehoe*, the appellant (K) appealed against a sentence of life imprisonment imposed following her guilty plea to manslaughter. K, who had been drinking with others, disclosed to a friend that having been provoked she had stabbed the victim. As in the present case, K had a number of previous convictions for offences involving violence. The psychiatric reports revealed, *inter alia*, that K's psychological development had been distorted as a consequence of suffering considerable abuse during her childhood. A pre-sentence report also suggested that she posed a high risk of harm. The judge imposed a sentence of life imprisonment with a notional determinate term of nine years and a fixed minimum term of four-and-a-half years. Upon appeal the court concluded that the specified term of nine years was manifestly excessive and applicable to cases of a wholly different nature. The implications of the *Kehoe* decision is that sentences of life imprisonment should be reserved for cases of the utmost seriousness, not necessarily those where the defendant poses a high risk of danger. As Openshaw J stated, 'When an offender meets the criteria of dangerousness, there is no longer any need to protect the public by passing a *J. Crim. L. 304 sentence of life imprisonment for the public are now properly protected by the imposition of the sentence of imprisonment for public protection ... We think that now, when the court finds that the defendant satisfies the criteria for dangerousness, a life sentence should be reserved for those cases where the culpability of the offender is particularly high or the offence itself particularly grave' (at [17]).

Nevertheless, conflicting authority suggests that considerable emphasis is being placed on risk assessment rather than the seriousness of the offence. In *R v Walsh* [2007] EWCA Crim 1454, [2008] 1 Cr App R (S) 33 (p.178), the court justified the imposition of a life sentence through psychiatric evidence which indicated that the offender was very dangerous. This position is erroneous. As Crane J stated (*R v Costello* [2006] EWCA Crim 1618, [2007] 1 Cr App R (S) 51 (p.286)), 'whether a sentence of custody for life or a sentence of public protection is appropriate ... the public is safeguarded for the future'. As a result, there is no need to impose a life sentence unless the offence is a particularly grave one. In most instances the offender will remain subject to s. 28 of the Crime Sentences Act 1997 despite the sentence received. The effect being that the offender will not be released from prison until the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner be confined (s. 28(6)(b)).

In reality the distinction between a discretionary life sentence and imprisonment for public protection in cases such as the present one is nominal. In order to impose the former the court must be satisfied that the offence itself was serious enough to justify a sentence of life imprisonment. It could perhaps be argued that once it has been established that W did not commit murder it is unfair to impose a sentence of life imprisonment. If it is acknowledged that W's culpability was reduced can it really be said that the homicide was sufficiently serious to impose such a sentence? Nevertheless, the court recognised that W's responsibility in the commission of the homicide was diminished and accordingly his life sentence was reduced by five years. In this respect, it could perhaps be argued that the discretionary life sentence serves as little more than a labelling exercise. Ultimately, however, the practical consequence of assessing the seriousness of the homicide is that decisions such as the present one will be rare in practice. This is largely due to the fact that the court is already satisfied that a lower level of culpability has been established. In most instances, where the concessionary defence can be established, a sentence of imprisonment for public protection will be imposed.

Nicola Wake

J. Crim. L. 2009, 73(4), 300-304

Appendix D

(a) Nicola Wake, 'Psychiatry and the new diminished responsibility plea; Uneasy bedfellows? *Journal of Criminal Law* (2012) *Journal of Criminal Law* 76(2), 122-129 (note).

(b) Nicola Wake, 'Substantial Confusion within diminished responsibility? (2011) *Journal of Criminal Law* 75(1) 12-16 (note).

Journal of Criminal Law

2012

Case Comment

Psychiatry and the new diminished responsibility plea: uneasy bedfellows?

Nicola Wake

Subject: Sentencing

Keywords: Diminished responsibility; Manslaughter; Murder; Sentencing

Legislation: [Homicide Act 1957 s.2](#)

[Coroners and Justice Act 2009 s.52](#)

[Criminal Justice Act 2003](#) Sch.21

Case: [R. v Brown \(Robert\) \[2011\] EWCA Crim 2796; \[2012\] 2 Cr. App. R. \(S.\) 27 \(CA \(Crim Div\)\)](#)

***J. Crim. L. 122** In this case the Court of Appeal considered whether the words 'substantially impaired' under s. 52(1)(b) of the Coroners and Justice Act 2009 ('the 2009 Act') imported a different test from that which was applied to the term 'substantial impairment' contained within the original s. 2(1) of the Homicide Act 1957 ('the 1957 Act'). In essence, the primary issue was whether the 'less than total but more than trivial' ruling adumbrated in *R v Ramchurn* [2010] EWCA Crim 194 continued to apply to the revised plea. The Court of Appeal also reviewed the relationship between Sch. 21 to the Criminal Justice Act 2003 ('the CJA 2003') and sentencing in manslaughter cases.

On 31 October 2010, the appellant (B) met his estranged wife at her home and killed her by repeatedly and violently striking her over the head with a hammer. The children of the couple were in a room two doors away when their mother was attacked. The daughter witnessed her father (B) wrapping up her mother's body before placing it into the car. As B drove the children to his house, his son asked if B was taking the victim to hospital, but B never did so, and he failed to call an ambulance. Having left the children with his girlfriend, B drove to Great ***J. Crim. L. 123** Windsor Park. On an earlier occasion, he had dug a large hole and buried a garden box in a remote area of the park. B dragged the body 100m from the track and wrapped it in plastic sheeting, before burying the body in the pre-arranged grave. B returned to his own home, changed, and then went out to dispose of his blood-stained clothing. B was subsequently arrested.

At trial, B pleaded guilty to manslaughter by reason of diminished responsibility on grounds of an adjustment disorder. Section 2 of the 1957 Act which, to reflect reduced mental responsibility, changes the categorisation of the offence from murder to manslaughter was significantly amended by s. 52 of the 2009 Act. The revised plea, in s. 2 (1) of the 1957 Act, requires the following: at the time of the killing the defendant must have been suffering from an 'abnormality of mental functioning' arising from a 'recognised medical condition'; that 'abnormality of mental functioning' must have 'substantially impaired' the defendant's ability to 'understand the nature of the defendant's conduct, form a rational judgement or exercise self-control'; and, finally, the abnormality must provide 'an explanation for the killing', i.e. it must be the 'cause, or a significant contributory factor in causing the defendant to kill'.

B was acquitted of murder and convicted of manslaughter before Reading Crown Court after the jury accepted the concessionary defence under the revised parameters of s. 2 of the 1957 Act. B was further convicted of obstructing a coroner in the course of his duty. The key issue at B's trial was whether the defendant's ability to exercise his self-control had been substantially impaired for the purposes of s. 2 of the 1957 Act. Cooke J was of the view that, although the jury concluded that B's culpability was diminished, it remained cogent. The trial judge considered previous authorities, which dealt with the necessary correlation between sentences for murder and voluntary manslaughter. He assessed the length of the minimum term which would have been imposed if the jury had convicted B of murder, as at least 28 years. Taking into account the guilty plea, the judge assessed the sentence at 24 years' imprisonment for manslaughter, with two years' imprisonment, to run consecutively, for the offence of obstruction, less time spent in custody on remand. The jury had concluded that B's

abnormality of mental functioning substantially impaired B's ability to exercise his self-control. B appealed on the ground that the sentence was disproportionate in light of the jury's verdict. Counsel for B contended that B's diminution in responsibility, and therefore culpability, was either overlooked or insufficient allowance was attributed to it during sentencing.

HELD, DISMISSING THE APPEAL, the court considered that s. 52(1)(b) of the 2009 Act did not require a revised interpretation of the term 'substantial impairment' for the purposes of the reformed s. 2(1) of the 1957 Act. It was noted that when Parliament enacted the 2009 Act it was aware of the way in which the court had interpreted the term 'substantial impairment' for many years (*R v Ramchurn* [2010] EWCA Crim 194). In the present case Cooke J had directed the jury that the reference **J. Crim. L. 124* to 'substantially impaired' required the defence to satisfy the jury that the impairment was more than minimal. Accordingly, Cooke J was entitled to conclude that B's responsibility for the death of his wife, although diminished, remained significant.

The Court of Appeal further considered the correlation between the minimum term guidelines for murder, under Sch. 21 to the CJA 2003, and sentencing in manslaughter cases. In murder cases, the sentencing judge must assess the minimum term to be served for the purpose of punishment and deterrence, prior to considering the issue of release. In most manslaughter cases, the sentence will not reflect the minimum term to be served; rather, it specifies the term, half of which will be served. Accordingly, their Lordships commented that, although it may be helpful, it is unnecessary for judges to set out an exact arithmetical computation of the sentence which would have been passed if there had been a conviction for murder. In the instant case, the total sentence imposed on B (making allowance for the mitigation arising from his diminished responsibility but also considering all of the aggravating features of the case) was not excessive.

COMMENTARY

The original diminished responsibility plea was radically altered by s. 52 of the 2009 Act, amending s. 2 of the 1957 Act, and the fundamental reformulations became effective on 4 October 2010 (see the Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010 (SI 2010 No. 816), art. 5). (For discussion, see M. Bohlander and A. Reed (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: London, 2011); R. Mackay, 'The Coroners and Justice Act 2009--Partial Defences to Murder (2): The New Diminished Responsibility Plea' [2010] Crim LR 290; R. Mackay and B. Mitchell, 'Loss of Control and Diminished Responsibility: Monitoring the New Partial Defences' (2011) 3 *Archbold Review* 5.)

The present case is not atypical of the diminished responsibility cases that preceded the 2009 Act. It is, however, the first to require the Court of Appeal to assess the novel terminology contained within the revised s. 2 of the 1957 Act. The judgment reaffirms key principles of *R v Ramchurn* [2010] EWCA Crim 194 and *R v Wood (Clive)* [2009] EWCA Crim 651 in terms of the interpretation of the diminished responsibility plea and sentencing procedures in manslaughter cases, respectively.

The original diminished responsibility plea required the defendant to establish that at the time of the killing he was suffering from an 'abnormality of mind' either arising 'from a condition of arrested or retarded development of mind or any inherent causes' or having been 'induced by disease or injury' (see R. Mackay, 'The Abnormality of Mind Factor in Diminished Responsibility' [1999] Crim LR 117 at 118). In 2006, the Law Commission noted that the phrase 'abnormality of mind' was not a psychiatric term, nor was there 'an agreed psychiatric meaning' to the aforementioned permissible causes of that abnormality (Law Commission, *Murder, Manslaughter and Infanticide*, Cm 304 (2006) para. 5.111). **J. Crim. L. 125* The amendments made under s. 52 of the 2009 Act were, therefore, designed to align the mitigating doctrine with 'developments in diagnostic practice' (Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, Ministry of Justice CP19/08 (2008) para. 49). The revised plea now requires an 'abnormality of mental functioning' arising from a 'recognised medical condition'. Although, see *R v Dowds (Stephen Andrew)* [2012] EWCA Crim 281, in which the Court of Appeal noted that the presence of a recognised medical condition was a necessary, but not always a sufficient condition, to raise the partial defence (at [13], [17], [35]-[41]). (For further discussion, see N. Wake, 'Recognising Acute Intoxication as Diminished Responsibility? A Comparative Analysis' (2012) 76 JCL 71.)

Their Lordships, in the present case, noted that this limb of the concessionary defence was implemented 'to ensure a greater equilibrium between the law and medical science' (at [23]). The

Royal College of Psychiatrists suggested that the importation of the 'recognised medical condition' requirement would 'encourage reference within expert evidence to diagnosis in terms of one or two of the accepted internationally classificatory systems of mental disorders (WHO ICD-10 and AMA DSM)' (Law Commission, above at para. 5.114 (Royal College of Psychiatrists)). Notwithstanding, in *Dowds* above, Hughes LJ observed that Parliament did not write the ICD-10 and/or DSM-IV into the legislation because of the extent of conditions contained therein, which are demonstrably unsuited to the concessionary defence ([2012] EWCA Crim 281 at [27]-[28], [30] and [35]).

Although expert witnesses, in the instant case, did refer to the ICD-10 when assessing the 'recognised medical condition' requirement, they disagreed as to whether B's adjustment disorder constituted an 'abnormality of mental functioning' for the purposes of the partial defence. It would appear, therefore, that the common disagreement between expert witnesses regarding the 'abnormality of mind' requirement under the original plea has been inherited in relation to the 'abnormality of mental functioning' limb of the newly ordered defence. Dr Alcock, for the defence, was of the view that B 'met the diagnostic criteria for an adjustment disorder', as defined in the ICD-10 (at [14]). In contrast, Dr Philip Joseph, for the prosecution, rejected the diagnosis of 'adjustment disorder' or indeed any other form of mental disorder which amounted to an abnormality of mental functioning (ibid.).

Commenting on the original diminished responsibility plea, Judge LJ suggested that where 'the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed' (*R v Cannings* [2004] 1 All ER 725, and see also B. McSherry, 'Expert Testimony and the Effects of Mental Impairment: Reviewing the Ultimate Issue Rule' (2001) 24 *International Journal of Law and Psychiatry* 13). The present case suggests that this issue will remain a pertinent one under the revised partial defence which continues to remain largely 'in the hands of expert witnesses' (O. Quick and C. Wells, 'Getting Tough with Defences' [2006] Crim LR 117). As Gibson notes, 'the jury will **J. Crim. L. 126* have to consider carefully instances where medical experts disagree' (M. Gibson, 'Intoxicants and Diminished Responsibility: The Impact of the Coroners and Justice Act 2009' [2011] Crim LR 909 at 920).

In the instant case, the jurors were persuaded by Dr Alcock's testimony and were therefore required to determine whether B's 'abnormality of mental functioning' substantially impaired his ability to 'exercise self-control'. Unlike the original diminished responsibility plea, which required that the 'abnormality of mind' substantially impaired the defendant's 'mental responsibility' for the killing, the reformulated plea clarifies which aspects of the defendant's functioning must be impaired in order for the partial defence to succeed; namely, his ability to 'understand the nature of his conduct; form a rational judgement; or exercise self-control' (Law Commission, above at paras 5.110-5.112).

The term 'substantial impairment' is one of few remnants of the original diminished responsibility plea. The present case reaffirms the ruling adumbrated in *Ramchurn*, in which the Court of Appeal reflected that 'substantially impaired' within s. 2(1) of the 1957 Act meant something more than trivial, but less than total (at [23]) (see also A. Reed and N. Wake, 'Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed and Something New' in Bohlander and Reed (eds), above at 191).

The Court of Appeal, in *Ramchurn*, referred to *R v Mitchell* [1995] Crim LR 506, which established that the word 'substantial' is a word 'for which one should not try to find a synonym. It is a word which members of the jury, with their own common sense, can tell what it means'. Professor Sir John Smith noted that *Mitchell* was 'a welcome departure' from a prevailing trend which required 'the jury to be directed to do what their common sense would naturally lead them to do anyway' ([1995] Crim LR 506 at 506-7).

Although the question of 'substantial impairment' is one for the jury, counsel for the defence and the Crown in the present case expressed views as to whether B's ability to exercise his 'self-control' had been 'substantially impaired' (Law Commission, above at para. 5.198). Dr Alcock noted that the effect of the adjustment disorder was to 'substantially impair' the defendant's ability to exercise his 'self-control' at the time of the killing (at [14]). In contrast, Dr Philip Joseph suggested that 'if [B] did suffer from [an adjustment] disorder, its extent would only be of relevance if the jury concluded that the defendant had killed his wife without any premeditation' (ibid.). Similarly, in *R v Clinton* [2012] EWCA Crim 2 (the first case to require the Court of Appeal to consider a combined plea of loss of control and diminished responsibility following the 2009 Act reforms), psychiatrists noted that the effect of the defendant's (C's) 'depressed state' would have meant that C was 'more likely to lose

self-control following his wife's graphic account of sexual activity with other men and her taunts that he lacked the courage to commit suicide' (at [33]).

In a study of the original diminished responsibility plea, Professor Mackay identified that although a minority of psychiatrists restricted themselves to a consideration of whether the defendant was, in fact, **J. Crim. L. 127* suffering from an 'abnormality of the mind,' almost 70 per cent expressed an opinion on the meaning of 'substantial impairment' (Law Commission, *Partial Defences to Murder*, Cm 290 (2004) para. 5.51). The present case suggests that the role confusion concerns inherent in s. 2 of the 1957 Act have not been alleviated by the statutory reforms (*R v Ramchurn* (2011) 75 JCL 12, commentary by N. Wake).

The explicit requirement that the defendant's 'abnormality of mental functioning' provides an 'explanation for the killing' is a new addition to the diminished responsibility plea (J. Chalmers, 'Partial Defences to Murder in Scotland: An Unlikely Tranquility' in Bohlander and Reed (eds), above at 176). The provision asserts that an explanation will be provided if 'it causes, or is a significant contributory factor in causing the person to carry out that conduct'. Ashworth suggested that the causal element would 'direct attention to the interaction of the medical condition with any other causal factor', and the present case appears to support this proposition (see A. Ashworth, 'Diminished Responsibility: Defendant Diagnosed as Suffering from Alcohol Dependence Syndrome But Having Sustained No Brain Damage as Result' [2008] Crim LR 976 at 978).

Dr Alcock advised that B had developed an adjustment disorder 'as a consequence of a number of life events from around April 2010 and thereafter, on a background of increasingly stressful life events commencing from 2007' (at [14]). His suggestion appears to imply that several factors were operating upon B at the time of the fatal act. The Court of Appeal noted, in *Clinton*, that both sexual infidelity on the part of the victim and C's 'abnormality in mental functioning' should be left to the jury when considering whether C's ability to 'exercise self-control' was 'substantially impaired' (at [28]). This is in line with the Ministry of Justice CP19/08 recommendation that '[the impairment] need not be the sole cause of the defendant's behaviour' but 'it should be a significant contributory factor in causing the conduct--that is, more than a merely trivial factor' (Ministry of Justice, above at para. 95).

In addition to providing guidance on the interpretation of the revised diminished responsibility plea, the present case reaffirms the principle, established in *Wood (Clive)*, that in manslaughter cases the court should have regard to the minimal custodial sentences stipulated in Sch. 21 to the CJA 2003 (see *R v Wood (Clive)* (2009) 73 JCL 300, commentary by N. Wake). In diminished responsibility cases, a variety of options is available to the sentencing judge. If the psychiatric reports recommend and justify it, and there are no contrary indications, the judge will make a hospital order. If the defendant constitutes a danger to the public for an unpredictable period of time, the appropriate sentence will, in all probabilities, be one of life imprisonment. In cases where the evidence suggests that the defendant's responsibility for his conduct was so grossly impaired that his degree of responsibility for them was minimal, then the judge will have the discretion to impose a lenient sentence; if there is no danger of repetition, this may take the form of an order which will afford the defendant supervised freedom. In cases where **J. Crim. L. 128* there is insufficient basis for a hospital order; but in which the defendant's degree of responsibility is not minimal, the judge should pass a determinate sentence of imprisonment; the length of such a sentence will depend on the judge's assessment of the degree of the defendant's responsibility and his view of the period of time, if any, for which the defendant will continue to be a danger to the public (*R v Chambers* (1983) 5 Cr App R (S) 190 at 193-4; see also Crown Prosecution Service, 'Homicide: Murder and Manslaughter', available at http://www.cps.gov.uk/legal/h_to_k/homicide_murder_and_manslaughter/).

The Court of Appeal, in the present case, acknowledged that the trial judge will only be required to assess the minimum term that the defendant must serve in rare cases, and where the seriousness of the offence justifies a sentence of imprisonment for life. In other manslaughter cases, the trial judge specifies the maximum term, only half of which will be served (at [24]). It is therefore unnecessary for judges seeking to apply the *Wood (Clive)* principle to set out the exact arithmetical computation of the sentence which would have been passed if there had been a conviction for murder. Notwithstanding, their Lordships suggest that the computation adopted by the trial judge in the instant case provided a helpful method of approach. The judge identified the necessary features of the case, both the aggravating and mitigating factors, before applying an appropriate discount for the defendant's reduced level of culpability. The Court of Appeal reiterated that sentencing in such cases is a fact-specific decision to be made by the judge, consistently with the medical evidence and the jury verdict. As noted in *Wood (Clive)*, a significant difference between sentences for murder and sentences for manslaughter, which were often close to murder, would be inimical to the administration

of justice.

The facts of the present case, in requiring the court to focus on the less contentious aspects of the reformulated defence, gave rise to a straightforward application of the diminished responsibility plea. The ruling reaffirms the views of academics who estimated that the 'less than total but more than trivial' principle advocated in *Ramchurn* would remain authoritative under the new law (see, for example, Reed and Wake, above at 191; R. Fortson 'The Modern Partial Defence of Diminished Responsibility' in Bohlander and Reed (eds), above). The case further suggests that the 'recognised medical condition' requirement does encourage reference within expert evidence to diagnosis in terms of the ICD-10 (Law Commission, above at para. 5.114). However, the judgment also embodies undertones of familiar conflict between psychiatry and the law (S. Morse, *Law and Psychiatry Rethinking the Relationship* (Cambridge University Press: Cambridge, 1984)). It highlights that role confusion pervading the original plea has endured in the wake of the 2009 amendments.

Medical experts continue to express an opinion on the meaning of the term 'substantial impairment'. They also continue to disagree on the issue of the defendant's ostensible 'abnormality'. In the instant case, expert witnesses differed first as to whether B suffered from a 'recognised medical condition' and, secondly, if the jury were satisfied that he **J. Crim. L. 129* did so, on the extent to which the disorder could constitute an 'abnormality of mental functioning'. The fact that the latter is a legal and not a medical term demonstrates that the '[l]aw and psychiatry are based on opposing paradigms, they cannot work together' (L. Kennefick, 'Introducing a New Diminished Responsibility Defence for England and Wales' (2011) 74 MLR 750 at 765).

The jury are therefore left with the unenviable task of deciding between the competing views of reputable medical experts (Quick and Wells, above). It would appear that, like its predecessor, the new diminished responsibility plea will also be determined by which evidence the jury find more convincing--the expert testimony provided on behalf of the defence or that provided for the Crown.

Nicola Wake

J. Crim. L. 2012, 76(2), 122-129

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Journal of Criminal Law

2011

Case Comment

Substantial confusion within diminished responsibility?

Nicola Wake

Subject: Criminal law. **Other related subjects:** Criminal procedure

Keywords: Diminished responsibility; Jury directions

Legislation: [Coroners and Justice Act 2009](#) s.52 (1)

Case: [R. v R \[2010\] EWCA Crim 194; \[2010\] 2 Cr. App. R. 3 \(CA \(Crim Div\)\)](#)

***J. Crim. L. 12** Keywords Diminished responsibility; Jury directions; Manslaughter; Murder; Substantially impaired

On 2 April 2005, the appellant (R) met with the victim and killed him by strangulation. R then told his wife that he had kept gloves and a rope in his car and that he had used the rope from the car to kill the victim. After having been arrested, R gave a number of false accounts including a false alibi, and then sought to persuade a number of witnesses to give false evidence or change their statements, in an endeavour to escape conviction.

After being charged with murder, R pleaded guilty to manslaughter by reason of diminished responsibility under s. 2(1) of the Homicide Act 1957. A successful pleading of the partial defence requires the following: at the time of the killing the defendant must have been suffering from an abnormality of the mind; the abnormality of the mind must have arisen from a condition of arrested or retarded development of the mind or any inherent causes or must have been induced by disease or injury; and the abnormality of the mind must have substantially impaired the defendant's mental responsibility for his acts or omissions in the commission of the fatal offence.

R was convicted of murder before Ipswich Crown Court after the jury rejected the concessionary defence of diminished responsibility. R appealed after the trial judge provided two directions as to the meaning of 'substantially' within 'substantially impaired'. In the summing-up, the judge had provided the jury with specimen directions as advocated by the Judicial Studies Board. The relevant passage for the present purpose reads:

'Substantially impaired' means just that. You must conclude that his abnormality of the mind was a real cause of the defendant's conduct. The defendant need not prove that his condition was the sole cause of it, but he must show that it was more than a merely trivial one which did not make any real or appreciable difference to his ability to control himself. (at [13])

Having retired to consider its verdict, the jury sought further assistance from the trial judge regarding the difference between 'trivial' and 'substantial'. In answering the request the judge gave a further direction. He said:

... 'Substantial' does not mean 'total'. That is to say the mental responsibility need not be totally impaired, so to speak, destroyed altogether. The other end of the scale, 'substantial' does not mean 'trivial' or 'minimal'. It is something in between and Parliament has left it to you to say on the evidence was the mental responsibility impaired and if so, was it substantially impaired?

***J. Crim. L. 13** The word 'substantial' means more than some trivial degree of impairment which does not make any appreciable difference to a person's ability to control himself but it means less than total impairment. (at [14])

R appealed arguing that in each direction the trial judge had provided a different definition. R contended that the judge had either erred in law or that s. 2(1) of the Homicide Act 1957 lacked the necessary certainty to comply with Article 7 of the European Convention on Human Rights.

HELD, DISMISSING THE APPEAL, provided the language the trial judge uses does not exaggerate the burden on the defendant, or improvise some extra-statutory additional obligation on the meaning

of 'substantially impaired', no valid ground for complaint would exist. The main issue before the court concerned the correctness of the directions of law given by the judge regarding the term 'substantially impaired'. The trial judge directed the jury in conventional terms in relation to the partial defence when he advised that the jury is entitled and indeed bound to consider not only the medical evidence, but the evidence on the whole facts and circumstances of the case.

The court rejected the suggestion that the second direction may have had the effect of undermining the earlier direction in the summing-up, referring to *R v Lloyd* (1966) 50 Cr App R 61, where it was accepted that there were different ways of explaining the same concept, and if necessary explaining its relevance to the jury. In the circumstances of this trial (with the jury requiring further elucidation of the concept of 'substantial' in the context of impairment) mere repetition of the trial judge's earlier directions would not have helped.

The court was of the view that the trial judge's directions were sufficient to enable the court to say with certainty that the jury was not satisfied that R's mental responsibility for his actions at the time of the killing was substantially impaired.

COMMENTARY

The present case is another in a surfeit of authorities highlighting the problems associated with s. 2 of the Homicide Act 1957. The s. 2 provisions have been subject to attack recently as having insuperable definitional problems. In 2003, the Home Secretary requested the Law Commission to consider and report on whether there should continue to be partial defences to murder and, if so, whether they should remain separate partial defences or should be subsumed within a single partial defence: Law Commission, *Partial Defences to Murder*, Law Com. Report No. 290 (2004). The Law Commission drew attention to Buxton LJ's contemptuous criticism that s. 2 of the 1957 Act definition is 'disastrous' and 'beyond redemption' (Law Com. Report No. 290 (2004) para. 5.43). It has been suggested that s. 2 encourages role confusion between jury, judge and psychiatrists. As a consequence of this poor wording and resultant role confusion, it is possible to adopt both narrow and wide interpretations of the provision. This often results in a 'gross abuse' of the partial defence (*ibid.* at para. 5.43).

Notwithstanding the pervasive difficulties associated with s. 2(1), the issue raised in the present case concerning the interpretation of the term **J. Crim. L. 14* 'substantial impairment' is infrequently considered. In this case, the Court of Appeal noted that the 1995 authority of *R v Mitchell* [1995] Crim LR 506 was the last occasion when an appellate court had been required to consider interpretation of the term. Previously, the case of *Lloyd* had taken the approach that the term meant something 'more than trivial but less than total'. The court in *Mitchell* suggested that *Lloyd* amounted to authority that the word 'substantial' is a word 'for which one should not try to find a synonym. It is a word which members of the jury, with their own common sense, can tell what it means'. As Professor Sir John Smith noted, *Mitchell* 'is a welcome departure from the current trend towards requiring the jury to be directed to do what their common sense would naturally lead them to do anyway' ([1995] Crim LR 506 at 506-7).

Despite the common-sense approach adopted by the courts, the role confusion alluded to previously is exacerbated when the court is required to consider the adumbration of 'substantial impairment'. In a study undertaken on behalf of the Law Commission, Professor Mackay identified that although a minority of psychiatrists restrict themselves to a consideration of whether the defendant was, in fact, suffering from an 'abnormality of the mind', almost 70 per cent express an opinion on the meaning of 'substantial impairment' (Law Com. Report No. 290 (2004) para. 5.51). The question of 'substantial impairment' is arguably not a matter of medical science, but a question which should be left to the jury (*ibid.* at para. 5.198). In other jurisdictions this problem does not arise. Under the New South Wales Law Crimes Amendment (Diminished Responsibility) Act 1997, for example, no expert testimony shall be given in relation to the term 'substantial impairment'. The Attorney-General commented that this would make the defence both 'stricter' and 'tighter' (*Hansard*, NSW Legislative Council, Second Reading, 25 June 1997, 11065).

Notwithstanding the problems inherent within s. 2 of the 1957 Act, the Law Commission recommended that 'pending any full consideration of murder, section 2 should remain unreformed' (Law Com. Report No. 290 (2004) para. 5.86). Despite this, the Law Commission advanced a 'tentative suggestion' (developed from a definition proposed by the Law Reform Commission of New South Wales) on how s. 2 of the 1957 Act might be reformed (*ibid.* at para. 5.93).

The Commission suggested that the current formulation could be improved by deleting the reference to 'substantial impairment of responsibility'. It was recommended that this term be replaced with an explicit test, namely whether the substantially impaired capacity to understand, etc. was a significant cause of the defendant's act in carrying out or taking part in the killing. The Commission suggested 'a significant cause' to make it clear that it need not be the sole cause, but it must have had a real effect on the defendant's conduct.

From 4 October 2010, s. 52(1) of the Coroners and Justice Act 2009 (2009 Act) replaces the pre-existing definition of 'diminished responsibility', as it appears in s. 2(1) of the 1957 Act, with new subs (1), (1A) ***J. Crim. L. 15** and (1B). This new plea is largely derived from the revised definition of diminished responsibility proposed by the Law Commission. Maria Eagle, Parliamentary Under-Secretary of State for Justice, suggested that the revised plea 'is really just a clarification of the way in which the defence works'. Nevertheless, s. 2(1), (1A) and (1B), as substituted for s. 2(1), is radically different from its antecedent, and the scope of the availability of the concessionary defence has been significantly altered.

New s. 2(1), (1A) and (1B) of the Homicide Act 1957 provides as follows:

(1) A person ('D') who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which--

- (a) arose from a recognised medical condition,
- (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
- (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.

(1A) Those things are--

- (a) to understand the nature of D's conduct;
- (b) to form a rational judgment;
- (c) to exercise self-control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

The term 'substantial impairment' contained within s. 2(1)(b) is one of very few remnants of the original diminished responsibility plea. Seemingly, therefore, the common-sense approach adopted in the cases of *Lloyd*, *Mitchell* and the present case will remain. Parliament has chosen to ignore the Law Commission's suggestion that the revised plea could specifically exempt expert testimony on the term 'substantial impairment' which would be in line with the position in NSW. In light of this, Professor Mackay has suggested that medical experts will continue to provide their opinion on the term 'substantial impairment' ([2010] Crim LR 290). It may be that Parliament was of the view that an express exemption would restrict the scope of the concessionary defence. In NSW the exemption has resulted in fewer pleas and the success rate of the plea in jury trials is lower: Judicial Commission of NSW, *Partial Defences to Murder in New South Wales 1990-2004*, Research Monograph 28, Guideline 20 (2006).

Nevertheless, it is futile to examine the potential scope of the term 'substantial impairment' in sequestration from new subs. (1A) which is inevitably restrictive. The only activities of the mind which are to be included are the three specified in subs. (1A). As Rudi Fortson QC highlights, new s. 2(1) of the 1957 Act 'will no longer involve a moral question [as to whether D's responsibility was substantially impaired], but a factual one': Criminal Bar Association of England and Wales, *Homicide Reforms under the CAJA 2009*, Seminar 16 October 2010.

***J. Crim. L. 16** The first element of subs. (1A) requires a substantial impairment of D's ability to understand the nature of his conduct. This element of the partial defence bears a resemblance to the first limb of the *M'Naghten Rules* (1843) 10 CJ & F 200 at 210, which require D to prove that D 'did not know the nature and quality of the act he was doing'. Professor Mackay has suggested that the terminology used in s. 2(1A)(a) of the 1957 Act appears more like a partial insanity plea than a plea of diminished responsibility ([2010] Crim LR 290 at 296). Mackay contends that subs. (1A)(a) has the potential to widen the ambit of the concessionary defence to include D who unsuccessfully claims

insane automatism. This might include, for example, D 'who is unable to understand the nature of his conduct' as a result of being only partially conscious when he kills V. The second and third elements of subs. (1A) are modelled on the leading judgment in *R v Byrne* [1960] 2 QB 396:

'Abnormality of mind' ... appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to *form a rational judgment* as to whether an act is right or wrong, but also the ability to *exercise will power to control* physical acts in accordance with that rational judgment. ([1960] 2 QB 396 at 403, emphasis supplied)

It might be suggested that the omission of the terms 'as to whether an act is right or wrong' and 'physical acts in accordance with that rational judgment' serves to widen the potential ambit of the new plea. Nevertheless, as Mackay suggests, when the three alternatives under subs. (1A) are considered alongside the remaining elements of the provision, there is a concern that these three things will be more restrictive in scope than those which fell under s. 2(1) of the 1957 Act as originally enacted.

Ultimately, the new provision does not detract from the fact that, in cases such as the present one, the members of the jury will inevitably be called upon to use their collective common sense in deciding whether D's 'mental responsibility' or indeed 'D's ability' was 'substantially impaired'. Seemingly, in cases of this nature, the decision will be dependent upon whom the jury find more convincing--the defence or the Crown. Similarly, Parliament does not appear to have taken the opportunity to alleviate the role-confusion concerns which were inherent in s. 2 of the 1957 Act through this revised plea. As a final note, it is perhaps worth echoing the salutary warning of one of the Law Commission's consultees: 'Change is always subject to the risk of unintended consequences together with an inevitable degree of speculation as to the extent of the need for change' (Law Com. Report No. 290 (2004) para. 5.81). Whether the common-sense approach advocated in the present case does endure in the wake of the amendments to s. 2 of the 1957 Act remains to be seen.

Nicola Wake

J. Crim. L. 2011, 75(1), 12-16

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Appendix E

Nicola Wake, 'Loss of control beyond sexual infidelity' (2012) *Journal of Criminal Law* 76(3), 193-197 (note).

Journal of Criminal Law

2012

Case Comment

Loss of control beyond sexual infidelity

Nicola Wake

Subject: Criminal law

Keywords: Diminished responsibility; Loss of control; Murder; Qualifying trigger; Sexual behaviour

Legislation: [Coroners and Justice Act 2009](#) [s.54](#) , [s.55](#) , [s.56](#)

Case: [R. v Clinton \(Jon-Jacques\) \[2012\] EWCA Crim 2; \[2013\] Q.B. 1 \(CA \(Crim Div\)\)](#)

***J. Crim. L. 193** On 15 November 2010, the appellant (C) killed his wife by striking her repeatedly with a wooden baton before strangling her with a ligature. The victim's body was found on the living room floor semi-naked. C was found in the loft with a noose around his neck. Two weeks before her death, the victim left C and their two children to begin a 'trial separation'. Both parties had a history of clinical depression and their marriage was fraught with financial difficulties. The day before the killing, the victim informed C that she had been having an affair with a man, Mr Montgomery, whom she had met via a social networking site.

On the day of the killing, C accessed several websites containing material on suicide; among the searches were entries referring to 'sleeping pills', 'how to hang yourself' and 'the best suicide methods'. C also accessed the victim's Facebook account where he 'tortured' himself over photographs of the victim and Mr Montgomery. The victim's relationship status indicated that she was 'separated' and 'open to offers'. C also found sexually explicit photographs which confirmed that his wife had been having an affair. When confronted, the victim informed C that she had engaged in sexual intercourse with five different men, going into graphic detail. The victim subsequently noticed that C had accessed suicide websites and proceeded to taunt him. She told him that he did not have the nerve and that 'it would have been easier if you had, for all of us'. The attack on the victim followed. C took explicit photographs of the victim in several different positions post mortem, and sent abusive messages to Mr Montgomery via SMS. C then composed a 'note to everyone' before preparing the noose.

At his trial for murder, C attempted to raise the partial defences of diminished responsibility and loss of control. The latter is contained in ss 54-56 of the Coroners and Justice Act 2009 ('the 2009 Act'). Section 54(1)(a) and (7) of the 2009 Act reduces a conviction of murder to one of voluntary manslaughter where the defendant kills subject to a loss of control. The loss of control must be attributable to at least one of two qualifying triggers. The first qualifying trigger is satisfied by a thing said or things done or said (or both) which constituted circumstances of an extremely grave character, and caused D to have a justifiable sense of being seriously wronged (the 'seriously wronged' trigger). The second qualifying trigger requires D to fear serious violence from V against D or another identified person (the 'fear' trigger).

***J. Crim. L. 194** To raise the defence successfully, the defendant must have lost his self-control in response to the 'seriously wronged' and/or 'fear' trigger(s). The statutory formulation excludes sexual infidelity as a permissible qualifying trigger and mandates, in effect, that the partial defence will only be left to the jury if sufficient evidence is adduced to raise an issue with respect to the defence on which, in the opinion of the trial judge, a properly directed jury could reasonably conclude that the defence might apply. The primary issue in this case was whether 'sexual infidelity' ought to be excluded where it did not constitute a thing done or said, but provided a context in which particular words were used.

The trial judge considered that the remarks allegedly made by the victim concerning her sexual infidelity were to be disregarded. The court observed that the remaining facts, vis-à-vis the taunts, were insufficient to constitute circumstances of an extremely grave character. The trial judge proceeded to leave diminished responsibility to the jury. C was convicted of murder before Reading Crown Court after the jury rejected the diminished responsibility defence under the revised

parameters of s. 2 of the Homicide Act 1957 ('the 1957 Act'). C appealed on the ground that the loss of control defence should have been left to the jury.

HELD, ALLOWING THE APPEAL, sexual infidelity should be considered where it formed an essential part of the context in which to make a just evaluation as to whether an ostensible qualifying trigger satisfied the partial defence. The Court of Appeal noted that there are three components to the loss of control defence. The first component, under s. 54(1)(a), requires the killing to have resulted from the defendant's loss of control. Section 54(2) provides that the loss of control need not be sudden.

The second component requires the loss of control to arise from the 'fear' and/or 'seriously wronged' trigger(s) (2009 Act, ss 54(1)(b) and 55(2), (3) and (4)(a)(b)). The 'seriously wronged' trigger requires objective evaluation. Section 55 (6)(a)-(b) precludes the mitigation from the defendant who, looking for trouble to the extent of inciting or exciting violence, loses his control. Under s. 55(6)(c), the fact that a thing done or said constituted sexual infidelity is to be disregarded. In this respect, the statutory provision is unequivocal: 'loss of control triggered by sexual infidelity cannot, on its own, qualify as a trigger' (at [20]). The exclusionary clause is more problematic where the defendant relies on an admissible trigger (or triggers) for which sexual infidelity provides an appropriate context. In this situation, the jury should be directed:

- (a) as to the statutory ingredients required of the qualifying trigger or triggers;
- (b) as to the statutory prohibition against sexual infidelity on its own constituting a qualifying trigger;
- (c) as to the features identified by the defence (or which are apparent to the trial judge) which are said to constitute a permissible trigger or triggers;
- *J. Crim. L. 195** (d) that, if these are rejected by the jury, in accordance with (b) above, sexual infidelity must then be disregarded;
- (e) that if, however, an admissible trigger may be present, the evidence relating to sexual infidelity arises for consideration as part of the context in which to evaluate that trigger and whether the statutory ingredients identified in (a) above may be established (at [49]).

The third component requires the jury to assess whether a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or a similar way to D (the 'ordinary person' test) (2009 Act, s. 54(1)(c)). Section 54(3) states that the defendant's circumstances extends to 'all' of the circumstances except those bearing on his general capacity for tolerance and self-restraint. In this regard, the issue of 'sexual infidelity' should, in appropriate cases, be considered when assessing the third component of the concessionary defence.

The Court of Appeal considered that, in the instant case, '[t]he totality of the matters relied on as a qualifying trigger, evaluated in the context of the evidence relating to the wife's sexual infidelity, and examined as a cohesive whole, were of sufficient weight to leave to the jury' (at [77]). The trial judge had erred in ruling that the victim's sexual infidelity should be disregarded. Accordingly, the appeal against conviction was allowed and a new trial ordered.

COMMENTARY

The instant case may be considered alongside the recent Court of Appeal ruling in *R v Dowds* [2012] EWCA Crim 281, noted below (pp. 197-202). The interpretation and subsequent application of the 2009 Act in both cases highlight that the new loss of control defence and the heavily revised diminished responsibility plea are in some respects too broad and in others too narrow. The judgment in the present case demonstrates a judicial willingness to ignore the sexual infidelity limb of the loss of control defence 'on the assumption that legislation is not enacted with the intent or purpose that the criminal justice system should operate so as to create injustice' (at [39]). In *Dowds*, the Court of Appeal adopted a restrictive view of the diminished responsibility plea on the basis that there is a 'divergence between the level of impairment which may bring a patient within a DSM-IV classification and the level necessary to have legal impact' for the purposes of the 'recognised medical condition' requirement (*Dowds* at [30]). The language in both cases may be compelling, but the notion that the judiciary is simply ignoring legislation on public policy grounds is disturbing, not least because it sets an uncertain precedent for future cases.

The 'sexual infidelity' prohibition has been described as a 'formidably difficult provision' and to be the most 'critical problem' as regards the loss of control defence (at [13]-[14]). It is unnecessary to restate the problems associated with defining the term 'sexual infidelity' and/or assessing the scope of the 'words and acts constituting' it, which are well **J. Crim. L. 196* documented (see D. Ormerod, *Smith and Hogan's Criminal Law* (Oxford University Press: Oxford, 2011) 521). The Court of Appeal in the present case suggested that the compartmentalisation of sexual infidelity may 'not be unduly burdensome ... where it is the only element relied on in support of a qualifying trigger', in which case it must be disregarded (at [39]). In most cases, however, sexual infidelity will be integral to the facts and to 'compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole ... is unrealistic and carries the potential for injustice' (at [39]). Accordingly, their Lordships ruled that where 'sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections 55(3) and (4), the prohibition in section 55(1) (c) does not operate to exclude it' (at [39]). The effect is that the victim's actions beyond his or her sexual infidelity (for example, the victim's taunts about C's failed suicide attempt) may satisfy the qualifying trigger(s) when considered in the context of that infidelity (V. Baird, "'Infidelity Plus'--the new defence against murder", *Guardian*, 2012, available at <http://www.guardian.co.uk/commentisfree/2012/jan/23/infidelity-plus-defence-murder>, accessed 8 April 2012).

In the present case, the fact that the victim's taunts per se were regarded insufficient to satisfy the seriously wronged trigger was considered immaterial. Accordingly, following this case, the 'sexual infidelity' exclusion operates where it is the *only* element relied on in support of a qualifying trigger (at [37]). It is difficult to see when 'sexual infidelity' will be the *only* element to be relied upon in support of a qualifying trigger. As their Lordships stated, 'daily experience in both criminal and family courts demonstrates that breakdown of relationships, whenever they occur, and for whatever reason, is always fraught with tension and difficulty ...' (at [16]).

The nub of the problem is arguably Parliament's egregious focus on 'sexual infidelity' as a catch-all term for those cases where a defendant kills out of sexual jealousy and/or envy (Memorandum from Jeremy Horder to the House of Commons (Coroners and Justice Bill, Committee Stage, 3 February 2009, CJ 01)), available at <http://www.publications.parliament.uk/pa/cm200809/cmpublic/coroners/memos/ucm102.htm>, accessed 8 April 2012). The rationale underpinning the controversial exclusion appears to be to prevent the loss of control defence from being made available to those who kill out of envy, jealousy and proprietorialness (ibid.). As Horder notes, however, 'by focusing on the quaint notion of sexual "infidelity" ... [the prohibition] distinguishes between sexual jealousy (possessiveness about something you have) ... at the unjustified expense of sexual envy (possessiveness about something you do not have)' (ibid.). Although infidelity killings may be prompted by sexual jealousy, such killings may also arise in response to extreme breaches of trust, excessive taunting and sexual humiliation (A. Reed and N. Wake, 'Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes' in M. Bohlander and A. Reed (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: London, 2011) 129. Further, **J. Crim. L. 197* envy and proprietorialness are more readily associated with stalking and the obsessed stalker who may or may not have had a prior relationship with the victim (Memorandum from Jeremy Horder to the House of Commons above). It appears paradoxical to exclude the former case automatically whilst leaving the latter to be considered by the trial judge.

The recent Independent Parliamentary Inquiry into Stalking Law Reform concluded that stalking is becoming increasingly common, particularly with the growth in use of social network sites (L. Richards, H. Fletcher and D. Jewell, *Independent Parliamentary Inquiry into Stalking Law Reform. Main Findings and Recommendations* (2012), available at <http://www.protectionagainststalking.org/InquiryReportFinal.pdf>, accessed 8 April 2012). Despite this, the sexual infidelity exclusion fails to extend to cases like that of *R v Stingel* (1990) 171 CLR 312, where an envious stalker stabbed his former girlfriend's new paramour, because such cases do not include any form of sexual infidelity (referred to in the judgment of the present case at [18]). Nevertheless, defendants like *Stingel* will remain ineligible to claim the loss of control defence since the trial judge has the authority to remove pleas predicated on possessiveness and jealousy from jury consideration (Law Commission, *Partial Defences to Murder*, Cm 290 (2004) para. 3.150; *R v Smith (Morgan)* [2001] 1 AC 146 at 169). In this regard, the sexual infidelity prohibition is superfluous since the loss of control defence will only be left to the jury if sufficient evidence is raised in relation to the defence which, in the opinion of the trial judge, a properly directed jury could reasonably conclude that the defence might apply. Despite the confusing rationale, the controversial exclusion remains part

of the loss of control defence. Nevertheless, the present ruling indicates that the prohibition will rarely be invoked since it is unlikely that sexual infidelity will be raised in isolation from other factors.

Nicola Wake

J. Crim. L. 2012, 76(3), 193-197

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Appendix F

Nicola Wake, Submission on the 'NZ Law Commission Issues Paper, *Victims of family violence who commit homicide* (NZ Law Com, IP No 39, 2015).

Nicola Wake¹, Submission on the ‘New Zealand Law Commission Issues Paper, *Victims of family violence who commit homicide* (NZ Law Com, IP No 39, 2015)’

CHAPTER 1: SETTING THE SCENE

Question 1: *Should the Commission’s review and any recommendations for reform be limited to the victims of family violence who commit homicide?*

No. There is concern that the narrow focus on victims of family violence potentially neglects other vulnerable offenders within the criminal justice system. For present purposes², these can be grouped into three categories: (a) those in family violence-type situations, but where there is no familial link or guardian/intimate relationship (‘fear’ cases); (b) those who suffer from a recognised medical condition short of insanity (‘diminished responsibility’ cases); and, (c) those who kill a terminally ill friend or relative (‘mercy killing’ cases).

Categories (b) and (c) would require the consideration of alternative defence models, and while other jurisdictions have considered iterations of provocation, excessive self-defence and diminished responsibility (with reference to mercy killers) at the same time³, it is not uncommon for these defences to be considered separately.⁴ In the context of this review, it makes sense to consider self-defence and the potential introduction of a new partial defence for those who kill in fear simultaneously, not least because a failure to assess how the two might operate in conjunction with one another has the potential to create difficulties in

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² It is clear that vulnerable categories of offender within the criminal justice system are not limited to these three categories (for example, young offenders may be categorised as vulnerable), but these categories are useful for present purposes.

³ See, for example, Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) (E&W).

⁴ See, for example, NSW Select Committee, *The Partial Defence of Provocation* (NSWSC, 2013) (NSW).

practice.⁵ It is worthy of note, however, that the actions of a primary victim⁶ attempting to defend themselves/another from familial violence will rarely result in homicide, and, as such, it is important that any reform recommendations to self-defence address instances of defensive conduct not amounting to lethal force.

Given that category (a) is most relevant to the area under consideration by the Law Commission, the analysis that follows focuses solely upon this category. The review addresses three situations that may be likened to familial violence, i.e. the victim is subjected to prolonged and systematic psychological, sexual, and/or physical harm. The situations selected include individuals subjected to human trafficking, those trapped by ostensible gang membership, and third party abuse. The situations identified are non-exhaustive, but are used to highlight potential problems with focusing solely upon victims of family violence. These examples demonstrate that those experiencing fear, anguish and desperation in the face of abuse, ought to have the same criminal justice system options available to them whether that abuse emanates from an intimate partner/family member or a stranger/third party; the mental state of the victim in these cases is broadly comparable, and this is why reform recommendations should not be arbitrarily restricted based upon relationship status. In all three situations outlined, it is recognised that women and children are particularly vulnerable.

Trafficking (and family violence)

The first family-violence-type scenario addressed relates to human trafficking. The Trafficking Protocol defines trafficking as:

The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force

⁵ For example, the difficulties associated with changing from a self-defence to a loss of control claim in England and Wales have been highlighted in the literature; Nicola Wake, 'Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives' (2013) *Journal of Criminal Law*, 77(5), 433-457 (ISSN: 1740-5580). *Dawes, Hatter & Bowyer* [2013] *WLR (D)* 130.

⁶ The 'primary victim' is the person 'who in the abuse history of the relationship) is experiencing ongoing coercive and controlling behaviours from their intimate partner'; Family Violence Death Review Committee, *Fourth Annual Report* (FVFR, 2014) 74 (NZ).

*or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*⁷

It is foreseeable, although it may be rare, that a victim subject to human trafficking, like the primary victim, may kill a trafficker (an abuser) out of fear and desperation. As with the primary victim, the victim of human trafficking is in a position of vulnerability and is therefore more likely to act when the trafficker is off-guard and, where available, with the use of a weapon. If amendments to the present law are limited to cases involving familial violence, this vulnerable category of offender would potentially be unable to raise a defence largely on the basis that the attacker was not a family member or relative. The relationship between the victim and the trafficker would likely need to be construed as one of dependency in order for a familial violence defence to operate; the problem with focusing primarily on familial violence is that not all abusive relationships include a familial link with the predominant aggressor.

The following victim testimonies are derived from the US Department of State, *Trafficking in Persons Report* 2015. The report notes that they are designed to be ‘illustrative only’.⁸ For present purposes, these illustrations are used to highlight situations where, were the victim to use lethal force, in order to effect an escape, most would expect that some form of mitigation ought to be available.⁹

⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (The Palermo Protocol), ratified 19 July 2002.

⁸ US Department of State, *Trafficking in Persons Report* (US DoS, 2015) available at: <<http://www.state.gov/j/tip/rls/tiprpt/2015/243362.htm>> accessed 14 December 2015.

⁹ Thankfully, support was afforded to these victims before the situations reached the level of lethal violence; *ibid.* Unfortunately, this is not always the case, and, as such, it is appropriate that

- *Natalie and Dara, eager to earn money and go to school, left Nigeria with the help of men who arranged their travel and convinced them good jobs awaited them in Cote d'Ivoire. Once there, Natalie and Dara were instead forced to have sex with men every night to pay back a \$2,600 'travel debt'.¹⁰*
- *When 14 years old, Cara met Max while on vacation in Greece with her mother. She fell in love with him and, after only a few weeks, Max persuaded her to move in with him, rather than return to England. He soon broke his promise to take care of her and forced Cara to have sex with strangers. Max first convinced her that the money she made was helping to keep them together; he later threatened to kill her mother if she tried to stop. In time, Max gave Cara to another trafficker who forced her to send postcards to her mother depicting a happy life in Athens.¹¹*
- *Tanya was only 11 years old when her mother traded her to a drug dealer for sex, in exchange for heroin. Tanya was raped, forced to commit sexual acts whilst being video recorded, and made to take heroin.¹²*
- *At 13 years old, Effia moved to the United States with family friends, excited to learn English and go to school-something her parents in Ghana could not afford. When she arrived, these so-called friends forbade her from attending school and forced her to clean, cook and watch their children for up to 18 hours a day. The father physically and sexually*

defences are available to those who kill in similar circumstances. Defences should not be arbitrarily restricted to a specific relationship dynamic.

¹⁰ This example is taken *verbatim* from the *Trafficking in Persons Report*, *ibid.*

¹¹ *ibid.*

¹² This example is derived, *mutatis mutandis*, from the *Trafficking in Persons Report* (n 8).

*abused her. Effia received no payment and could not use the telephone or go outside.*¹³

The global increase in human trafficking and modern day slavery means that there is a greater chance that victims may use violence in order to escape. New Zealand is recognised as ‘a destination country for foreign men and women subjected to forced labor and sex trafficking within the country’.¹⁴ That the New Zealand government has instigated its first human trafficking prosecution this year,¹⁵ and two traffickers have been convicted in child sex trafficking cases, highlights that human trafficking is a live issue in New Zealand, as it is in many other jurisdictions.¹⁶ The New Zealand Law Society have suggested that the case may be ‘merely the tip of the iceberg and New Zealand should have growing concern about human trafficking and forced labour exploitation.’¹⁷ It is possible that a case may arise where a victim of human trafficking kills in order to escape the terrifying and bleak existence to which they have been subjected. The feelings of fear, desperation, and helplessness are likely to be similar to those experienced by the primary victim. The question that ought to be asked is whether it is primary victims only that the recommendations ought to protect or whether it is victims of abuse more generally who find themselves in the same or a similar situation to the primary victim, but for the intimate relationship or familial link? It may be that the latter case is rare, but so too are cases where the primary victim kills a predominant aggressor; nevertheless, most would agree that these vulnerable individuals merit the compassion of the law.

Ostensible gang membership

The second situation identified is that of *ostensible* gang membership. Criminal gangs may exploit victims of human trafficking, but not all gangs are involved in human trafficking. All criminal gangs may create or foster a situation whereby

¹³ This example is taken *verbatim* from the *Trafficking in Persons Report*, *ibid*.

¹⁴ *ibid* 260.

¹⁵ Charles Anderson and Jess Pullar, ‘Trio plead not guilty in New Zealand’s first human trafficking trial’ (2015) available at: <<http://www.stuff.co.nz/national/crime/73817107/trio-plead-not-guilty-in-new-zealands-first-human-trafficking-trial>> accessed 14 December 2015.

¹⁶ (n 8) 260.

¹⁷ New Zealand Law Society, ‘Modern day slavery and human trafficking’ available at: <<https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-851/modern-day-slavery-and-human-trafficking>> accessed 14 December 2015. See, generally, (n 8).

ostensible members are, in fact, victims of the gang who feel unable to escape. In many instances it can become very difficult to identify a victim. Potential victims may be reluctant to disclose details of the trafficking or gang membership for fear of punishment by the authorities, and/or traffickers/gang members.¹⁸ A trafficker or gang member may become romantically involved with the victim, thereby adding to the difficulty in distinguishing between the victim and the perpetrator.¹⁹

The Commission note that ‘gangs are environments that compound and exacerbate traditional assumptions about women’s roles and violence towards women’.²⁰ There are two circumstances to consider. Firstly, the circumstances of individuals who are involved in intimate relationships with gang members and are being subjected to abuse within the relationship. The second type of circumstance covers individuals who are not in an intimate relationship with a gang member, but are being subjected to abuse by one or more gang members. The parameters of the present review may assist individuals engaged in relationships with gang members, by raising awareness that the individual is, in fact a victim of familial violence and not a willing participant in the gang. At present, there is a lack of awareness of the dynamics of familial abuse in gang-related contexts. The review is less likely to assist those who are not in an ‘intimate relationship’ with a gang member.

It is worth noting at the outset, that distinguishing between genuine and ostensible gang membership will often be difficult. The criminal law has adopted a strict exclusionary approach to those who voluntarily associate with criminal gangs. For example, in both New Zealand and England and Wales, those who engage with gang members are unable to avail themselves of the defence of duress by threats due to their prior fault in associating with the gang.²¹ The

¹⁸ See, generally, UK Home Office, *Victims of modern slavery* (UKHO, 2015) available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450834/Victims_of_modern_slavery_frontline_staff_guidance_v2_0_ext.pdf> accessed 14 December 2015.

¹⁹ *ibid* 18. Of course, ‘romantic attachments’ may be covered by the parameters of this consultation.

²⁰ New Zealand Law Commission Issues Paper, *Victims of family violence who commit homicide* (NZ Law Com, IP No 39, 2015) para 2.32.

²¹ *Fitzpatrick* [1977] NI 20 (CCA); *Shepherd* (1988) 86 Cr App R 47 (CA); *Sharp* [1987] QB 853 (CA); *Ali* [1995] Crim LR 303, CA; *Baker & Ward* [1999] 2 Cr App R; *Hasan* [2005] UKHL 22.

principle established by the House of Lords in *Hasan*²² is that the excuse of duress by threats is not available to someone who has voluntarily put himself in a position in which he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence.²³ More recently, in England and Wales, gang membership has been utilised to restrict the availability of the loss of control defence. In *Gurpinar & Kojo-Smith*,²⁴ the Court of Appeal appeared to suggest that an ordinary person would not act in the same or a similar way to a gang member. The problem is that in some cases, ostensible gang membership may occur, particularly in the context of abuse. In these cases, focusing on the gang membership, in the absence of appropriate consideration of the abuse has the potential to lead to unjust convictions/sentences. As the Commission identify,²⁵ this problem was illustrated in the case of *Wihongi*²⁶:

Wihongi stabbed her estranged partner, Mr Hirini, following an argument over him taking several thousand dollars in compensation she had received, during the course of which he demanded sexual intercourse. Before issuing the eight-year sentence, Justice Wild of the High Court described Wihongi's 'history of victimhood'. At the age of 13, Wihongi suffered an anoxic brain injury following a drugs overdose in response to an argument with her mother. Upon leaving hospital, she was unable to walk or speak properly and when she eventually returned to school she lasted less than one month before leaving and never going back. From that point, Wihongi had consistently abused alcohol and, at the age of 14, was sexually abused by her drug and alcohol counsellor. Shortly thereafter, Wihongi began a relationship with Mr

²² *Hasan*, *ibid.*

²³ *Ali* [2008] EWCA Crim 716 [12].

²⁴ [2015] EWCA Crim 178.

²⁵ NZ Law Com, IP No 39, 2015 (n 20) para 2.33. The Commission note, in particular, that provocation was relevant at sentencing despite not being raised at trial (the offence having taken place prior to the repeal of provocation); para 5.39.

²⁶ HC Napier CRI 2009-041-2096 [2010] NZHC 2034 (30 August 2010).

Hirini's older brother who prostituted her for money and drugs over a six-month period. At the age of 16, she commenced a 'tempestuous and chaotic' relationship with Mr Hirini, a 'Black Power' gang member. The relationship was marked by alcohol abuse and domestic violence and Wihongi was gang-raped many times by members of the 'Black Power' gang. At the age of 19, a member of the gang threatened to harm Wihongi's baby daughter before raping her in her own home. When she was 26, an intruder broke into her home and hit her over the head with a full bottle of beer in front of her children. Justice Wild was of the opinion that Hirini's demand for sexual intercourse triggered Wihongi's loss of self-control. He considered that Wihongi's violent response may have been the product of 'an overwhelming sense of anger, threat and fear driven by a combination of cognitive impairment, the effects of repeated trauma, personality dysfunction and the chaotic and conflicted relationship she had with the victim.' Women's Refuge extolled the sentence of the High Court as 'brave and right', but the Court of Appeal subsequently substituted the eight-year prison term with a sentence of 12 years on grounds that Wihongi represented a 'high risk of reoffending' due to her association with the gang.²⁷

It is clear that there is a lack of understanding regarding the nature of intimate partner violence in gang related settings. The problem is that once a primary victim becomes associated with a gang, dissociation from that gang can be very difficult. Gang members may demand money or force the individual to commit a crime. In other instances the gang member may be punished before being allowed to leave the gang. In cases involving the primary victim, they may

²⁷ Extract taken *verbatim* from Nicola Wake, 'Anglo-Antipodean Perspectives on the Positive Restriction Model and Abolition of the Provocation Defence' in Ben Livings, Alan Reed and Nicola Wake (eds) *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholars Publishing, 2015) 365-405 [references omitted].

simply not be able to leave the gang because they are too frightened to do so, or alternatively because the predominant aggressor and other gang members will not allow it.

In cases, where there is no intimate relationship between the individual and the gang member, that individual may continue to be vulnerable to abuse from gang members. Vulnerable individuals, particularly women and children who have been repeatedly failed by the system in devastating ways may seek refuge in a gang; for these individuals, the gang may offer protection from traumatic familial abuse.²⁸ The problem is that such protection comes at a high price, particularly for women, who may be subjected to psychological, sexual and violent abuse by members of the gang. It is common for intimate relationships to exist between gang members, but this is not always the case, and it is therefore important to ensure that any revisions to self-defence and/or the introduction of a new partial defence do not unjustifiably exclude vulnerable categories of offender on the grounds that there is no familial link between the offender and their abuser.

Third party abuse

Outside the context of gang membership and human trafficking, abuse may be committed by a third party, not necessarily a partner or relative. An individual in a position of trust, for example, a teacher, a counsellor, a health worker in relation to a child or vulnerable adult, may abuse that position. In cases where the individual is particularly vulnerable it is sadly not uncommon for this abuse to be repeated by the perpetrator. In such situations, the vulnerable individual may feel trapped, frightened and desperate to escape the situation. It is possible in these circumstances that an individual may respond to that abuse with violence. As previously noted, recommendations for reform ought to cover familial violence-type situations, rather than being limited to cases involving family violence.

²⁸ Glennis Dennehy, 'Troubled journeys: an analysis of women's reality experience within New Zealand gangs' (University of Canterbury, 2000) available at: <<http://ir.canterbury.ac.nz/handle/10092/5629>> accessed 14 December 2015.

The ‘fear that any perceived widening of defences to homicide may be successfully utilised by “undeserving” defendants’²⁹ is not an adequate reason to exclude entire categories of vulnerable offenders, where the fatal conduct is in response to genuine fear; any new defence in this area ought to capture deserving cases, whilst being robust enough to exclude unmeritorious cases. The lack of appropriate defences/partial defences in this context is inherently unjust. It is inappropriate to label as murderers those whose responsibility has been substantially impaired by the abuse they have suffered. The presumption in favour of life imprisonment in New Zealand, combined with the strict sentencing regime, means that such individuals are also likely to receive lengthy prison sentences. The Law Commission is urged to consider vulnerable offenders who kill in fear outside the family violence situation, but where the circumstances of the case may be linked to family violence cases.

CHAPTER 2: FAMILY VIOLENCE

Question 2: *We welcome feedback on our discussion of family violence and the circumstances of primary victims who kill their abusers.*

The recommendation that the ‘overall architecture’ of family violence be considered in these cases is a welcome one.³⁰ It is important to assist the jury (and the criminal justice system) in understanding the circumstances of the primary victim. A shift to considering the circumstances of the primary victim is important because this should encourage a departure from the psychologising of victims of domestic abuse through ‘battered woman syndrome’ or ‘battered person syndrome’; casting the primary victim’s response as irrational as opposed to reasonable in the circumstances is inherently unfair. A shift to considering the circumstances of family violence is needed in cases of this context.

CHAPTER FIVE: PROBLEMS WITH THE CURRENT LAW-IS THERE A NEED FOR REFORM

Question 3: *Should it be possible for a defendant who is a victim of family violence to be acquitted on the basis that he or she acted in self-defence where:*

²⁹ (n 20) para 1.20.

³⁰ *ibid*, para 2.50.

- (a) the harm sought to be avoided was not imminent or immediate; and/or*
- (b) the fatal force was not proportionate to the force involved in the harm or threatened harm?*

(a) A reassessment of the interpretation and application of self-defence is required. The focus ought to be on whether the defendant believed that force was necessary. The use of force may be necessary, even in cases where it is not regarded imminent in the traditional sense. For example, the primary victim may experience a state of on-going fear linked to abuse. In most cases, therefore, the threat to the primary victim may be almost always imminent. Unfortunately, the current restrictive interpretation of imminence excludes fear of an overarching, on-going, impending threat to the life of the primary victim, and to those to whom she is responsible. It is not a change to the current wording of the defence that is required, but further clarification as to what imminence may mean in the context of abuse. The significance of the primary victim's 'perception of danger is not its imminence. It is that it renders the defendant's use of force really necessary.'³¹ Future reforms must assist in changing engrained perspectives of familial violence, and a reassessment of current provisions would be a useful starting point. It may be that an additional clause is needed which clarifies the 'necessity' requirement and/or bespoke jury directions advising jurors that a pattern of abuse suffered by the defendant may cause the defendant to believe that force is necessary, depending upon the circumstances of the case.

(b) Similarly a reassessment of the concept of reasonableness/proportionality is required in cases involving familial violence. For example, it may be reasonable for the primary victim to use a weapon in the circumstances, as she perceives them to be. The predominant aggressor has exerted dominance over the primary victim for a significant period of time so the primary victim knows that she cannot defend herself without the use of a

³¹ *Lavellee* [1990] 1 SCR 852.

weapon. She may have previously been severely beaten for attempting to defend herself. This fear means that it may be reasonable or proportionate to strike more than once or even a number of times. This is not about saying that disproportionate force can be utilised, but about recognising that the concepts of proportionality and/or reasonableness ought to be interpreted in light of the context that force is used. This means that what is reasonable/proportionate will often depend not only upon the threat of harm, but also the respective sizes of the parties, and the circumstances (history) of the defensive conduct.

Question 4: *If the answer to question 3 is yes, do you consider that legislative reform is necessary to achieve that objective?*

As previously noted, additional clauses could be inserted into the current law that explain the concepts of necessity (imminence) and proportionality in the context of family-violence-type situations (this point is explored further in relation to questions 8-13 below). Alternatively, bespoke jury directions, designed to explain the concepts of necessity and proportionality could be provided.

Question 5: *Do you consider there is a case for reform to recognise reduced culpability of victims of family violence (where self-defence does not apply)?*

There is a need to introduce a partial defence (PD) or an alternative homicide offence (AO) capable of recognising the reduced culpability of the primary victim who kills in cases where self-defence does not apply. The benefits associated with recognising reduced culpability include, *inter alia*:

- A potential reduction in the number of murder charges being brought in these cases, because it is possible to charge an alternative offence (AO).
- The primary victim is less likely to plead guilty to murder on the basis that there is a 'fall back' option should self-defence fail (PD or AO);
- Some cases may not justify an acquittal on the basis of self-defence, but the circumstances are such that a murder conviction would not accurately

reflect societal expectations and the reduced culpability level of the primary victim (PD or AO);

- A clear message as to why jurors reached their decision is provided in cases where the primary victim is convicted if an AO or a PD is accepted.
- The availability of an AO or PD would help to reduce the current practice of jury nullification (manslaughter verdicts being returned on grounds that the defendant lacked the requisite *mens rea*, despite significant evidence that the defendant did have the relevant *mens rea*) that appears to be operating in relation to these cases.
- Conviction of an AO or the successful raising of a PD would also send a clear message to the sentencing judge that the case is one that society recognises as carrying a lower level of culpability.
- In terms of fair labelling, in most cases (if not all) it will be inherently unfair to label the primary victim a murderer.

The Issues Paper raises valid concerns regarding the introduction of an AO or PD, but the benefits to introducing a new provision far outweigh the potential issues identified.

Question 6: *Do you consider there is a need to improve understanding of the dynamics of family violence by those operating in the criminal justice system?*

The problems associated with understanding the dynamics of family violence cannot be resolved by legislative amendments alone. Individuals within the criminal justice system need to be in a position to recognise when domestic violence is in issue for the purposes of dealing with the primary victim, and providing appropriate instruction/direction, etc.

Question 7: *Do you think there are currently problems with introducing family violence evidence, including expert witness evidence, in criminal trials?*

Problems with introducing family violence evidence

The lack of a formal direction requiring that family violence evidence be admitted where it is in issue means that in some cases appropriate guidance may

not be provided to the trial judge and the jury. This could be rectified by legislative amendments relating to the admissibility of social framework evidence, and specific jury directions, considered further below.

There is a genuine concern that evidence could be used to demean the victim. The trial of Clayton Weatherston provides a fundamental example of this issue.³² Following the defendant's protracted televised testimony whereby he claimed that he had killed the victim because of 'the emotional pain that she [had] caused [him]'.³³ Weatherston alleged that the victim had contracted an STI following casual sex with a stranger whilst on a trip. He led evidence that she attacked him and read extracts from her diary to the court that he claimed showed that she had a tendency towards violence.³⁴ Weatherston's unrepentant televised testimony was branded a 'national disgrace'³⁵ and there was a prevailing view that Weatherston had used the provocation defence as a vehicle to place the victim on trial.³⁶ Despite the ostensible difficulties associated with the introduction of social framework evidence, the fact remains that in order to understand the 'circumstances' of the primary victim, contextual information must be adduced and the introduction of a social framework model, with appropriate limitations, would assist in ensuring that such evidence is made available under the same conditions in each case. The difficulties identified could also be avoided by legislatively authorising the trial judge to refuse to hear evidence that unnecessarily demeans the victim.³⁷ This authorisation should not limit the use of evidence providing an important contextual narrative or prevent the use of evidence where there are good reasons for its admission. The effect of such a clause would be to address 'the despicable practice of gratuitous blame directed

³² *Clayton Robert Weatherston v The Queen* [2011] NZCA 276, 2. This analysis of the Weatherston case is derived from 'Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives' (n 5) 454-6.

³³ Weatherston, *ibid*.

³⁴ *ibid*, 25.

³⁵ Jarod Booker, 'Jury finds Weatherston guilty of murder', *New Zealand Herald*, 22 July 2009, available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10585763, accessed on 14 August 2013. See also *Hamidzadeh v R* [2012] NZCA 550 (28 November 2012), the first case to consider the impact of provocative words or conduct on sentencing for murder. For a detailed analysis of the *Hamidzadeh* case see, Warren Brookbanks, 'Provocation and Sentencing' (2013) (April) *New Zealand Law Journal* 120-4.

³⁶ Booker *ibid*, 144.

³⁷ See, for example, Evidence Act 2008 (Vic), section 135 (d). See generally, Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2014).

at victims during homicide trials', whilst simultaneously allowing evidence relating to family violence to be admitted.³⁸

There is also genuine concern that the predominant aggressor might attempt to manipulate the system by invoking family violence provisions where this is unwarranted. The surreptitious nature of family violence, combined with manipulation exhibited by the predominant aggressor may render it difficult in some cases to distinguish between genuine and disingenuous claims.³⁹ This may leave the relevant defence(s) open to abuse, in addition to creating suspicion in genuine cases. There is significant literature on this issue⁴⁰, and the Victorian case of *Creamer*⁴¹ provides a pertinent illustration of the potential difficulties.

The relationship between Creamer and the aggressor was described as 'largely, if not entirely, dysfunctional'.⁴² Each engaged in extra-marital affairs, encouraged by the aggressor.⁴³ The aggressor frequently requested that Creamer engage in group sex, which she 'resented strongly'.⁴⁴ On the weekend of the killing, Creamer believed that the aggressor had arranged for her to engage in group sex. According to her evidence, the aggressor had hit her in the genitals with a knobkerrie while she was sleeping, accused her of having sex with his brother, and insisted that she smell his semen stained sheets before placing them over her head.⁴⁵ Immediately before the fatal act, the aggressor repeatedly smacked Creamer in the face and threatened to 'finish her off',

³⁸ Hansard, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic), second reading 3 September 2014, Mr McCurdy, Murray Valley, 3138.

³⁹ See, for example, the cases of *Creamer* [2011] VSC 196 and *Shera* [2011] VSCA 242; [2009] VSC 526.

⁴⁰ See, in particular, DVRCV, *Justice or Judgement? The Impact of Victorian Homicide Law Reforms on Responses to Women Who Kill Intimate Partners* (DVRCV Discussion Paper No 9 2013).

⁴¹ *Creamer* (n 39).

⁴² *ibid* [6].

⁴³ *ibid* [7].

⁴⁴ *ibid* [7] and [14].

⁴⁵ *ibid* [17] and [19]. A knobkerrie is a South African weapon in the form of a stick with a knob on the end of it [20].

*before attempting to push his penis in her mouth and urinating on her.*⁴⁶ *Creamer managed to hit the aggressor in the genitals before grabbing a knife and stabbing him to death. The prosecution asserted that rather than being a victim of domestic abuse, Creamer had initially denied her involvement in the killing because she had no excuse. She was portrayed as being jealous of the aggressor's extramarital affairs and annoyed at his decision to leave her for his former wife.*⁴⁷ *The forensic evidence did not fully accord with Creamer's account, and the sentencing judge rejected a significant proportion of her evidence, describing her as an 'unsophisticated witness'.*⁴⁸ *In particular, Coghlan J suggested that the jury had rejected Creamer's allegation that she had been raped previously by the aggressor because Creamer chose to stay with him, and had not disclosed such evidence prior to trial.*⁴⁹

*Toole notes that the availability of defensive homicide worked to Creamer's advantage. Rather than 'being obsessive, jealous and controlling...her husband encouraged and facilitated [Creamer's] affairs'.*⁵⁰ *In this respect, Toole argues that defensive homicide had the 'potential to both protect and criminalise lethal conduct by women in inappropriate and unintended ways'.*⁵¹ *In contrast, the Domestic Violence Resource Centre Victoria contends that this assessment demonstrates a 'lack of understanding about how psychological manipulation, sexual degradation and coercive control*

⁴⁶ *ibid* [21]-[22].

⁴⁷ *ibid* [10]-[12].

⁴⁸ *ibid* [16].

⁴⁹ *ibid* [32].

⁵⁰ Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality Before the New Victorian Law' [2012] *Monash University Law Review* 36, 250, 283.

⁵¹ *ibid* 286.

are forms of family violence'.⁵² The primary victim may feel unable to disclose details of abuse because 'of a deep sense of shame and self-blame'.⁵³ It is worrying that such abuse continues to be viewed at the 'lowest end of the spectrum'.⁵⁴ The amendments to prevent victim blaming and fact fabrication are welcome, but it may be difficult in practice to reliably distinguish genuine from disingenuous facts, particularly given the hidden nature of domestic abuse.⁵⁵

The difficulties associated with distinguishing genuine from disingenuous claims will always be a potential issue in the context of familial abuse. The best way to reduce the risks identified above is to ensure that any legislative reforms are combined with a comprehensive education package designed to assist those within the legal system to appropriately respond to such cases.⁵⁶

Problems with expert evidence

In relation to expert evidence, more specifically, a fundamental issue is the continued use of the term 'battered woman syndrome'.⁵⁷ In England and Wales and New Zealand, recognition of battered woman syndrome initially permitted the introduction of medical evidence to help jurors to understand the psychological effects of domestic abuse, whilst contemporaneously depicting the abused defendant as extraordinary or irrational. Where expert testimony on battered women syndrome is provided, this potentially has the effect of recasting the defendant as helpless or psychologically deranged suggesting that her

⁵² DVRCV (n 40) 28. See also, Evan Stark, 'Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58 Albany Law Review 973.

⁵³ DVRCV *ibid* 27.

⁵⁴ *Creamer* [2012] VSCA 182 [41].

⁵⁵ Extract from Nicola Wake, 'His home is his castle. And mine is a cage': a new partial defence for primary victims who kill' Northern Ireland Legal Quarterly 66(2) 151-77.

⁵⁶ See Danielle Tyson, Debbie Kirkwood, and Mandy McKenzie, 'Family Violence in Domestic Homicide Cases: A Case Study of Women who Killed Intimate Partners Post-Legislative Reform in Victoria, Australia' *Violence Against Women International Journal* (forthcoming 2016).

⁵⁷ Equal Justice Project, *Battering the Law* (Equal Justice Project) available at: <<http://equaljusticeproject.co.nz/2013/09/battering-the-law/>> accessed 14 December 2015. See, generally, Lenore Walker, *The Battered Woman Syndrome* (Harper and Row, 1979).

conduct is irrational rather than understandable in the circumstances.⁵⁸ Although a cycle of abuse may result in a psychological condition, this is not always the case, and the continued categorisation of the abused woman who kills as ‘less than rational rather than less culpable’ is inherently unfair.⁵⁹ The introduction of social framework evidence would assist in reducing issues associated with the use of expert evidence in cases involving familial abuse.

Henderson and Seymour have also recently identified general problems with the use of expert evidence. These issues are outlined in the following extract:

The problems identified with expert evidence in the literature are, in summary:

- *Concerns that flawed expert evidence is being presented to courts, including flaws resulting from deliberate dishonesty, incompetence and/or bias;*
- *Concerns that juries and also judges are not competent to assess expert evidence and therefore will not notice its flaws;*
- *Concerns that, regardless of the quality of the evidence, juries especially may be overwhelmed by the authority or charisma of the expert and allow the expert to usurp their function as fact-finders;*
- *Concern that the traditional safeguards of the adversarial trial are insufficient to notify the judge and jury as to the flaws in expert evidence;*
- *Concern over the sufficiency of the adversarial model of trial in its dealings with expert evidence;*
- *Concerns over the treatment of expert witnesses by the courts and by lawyers.*

⁵⁸ Elizabeth Sheehy, Julie Stubbs, and Julia Tolmie, ‘Defending Battered Women on Trial: The Battered Women Syndrome and its limitations’ (1992) 16 Criminal Law Journal 369.

⁵⁹ NSW Legislative Council Select Committee, *The Partial Defence of Provocation* (NSW LCSC, 2013) para 2.49 citing Julia Stubbs. See, generally, Celia Wells, ‘Battered Woman Syndrome and Defences to Homicide: Where Now?’ (1994) Legal Studies 266, and Stanley Yeo, ‘Battered Woman Syndrome in Australia’ (1993) 143 New Law Journal 13.

*The picture is complex and nuanced. It includes issues with the substance of expert evidence, the experts themselves and with the courts.*⁶⁰

The report suggests that many of these problems are ‘solvable’⁶¹, noting, in particular, that making expert evidence easier to understand would assist. In the context of the Law Commission’s current work, the introduction of jury directions, social framework evidence and a comprehensive education package would undoubtedly assist in ensuring that expert evidence is easier to understand. The guidance would also assist experts by informing them of the type of issues they may be asked to comment upon, thereby ensuring a more consistent approach in this type of case.

CHAPTER SEVEN: OPTIONS FOR REFORM OF SELF-DEFENCE

Question 8: *Which of these three options for reform of self-defence would you prefer, and why?*

- *Option 1: Introduce a new provision that clarifies that, under section 48, the force used by the defendant may be reasonable even though the defendant is responding to a harm that is not immediate or uses force in excess of that involved in the harm or threatened harm.*

As identified by the Commission, the relaxation of the immediacy requirement and to some extent the proportionality requirement that has occurred in other jurisdictions has not occurred in New Zealand. This means that ‘immediacy of life threatening violence’ and the absence of a viable, non-violent escape option is required before self-defence is engaged.⁶² Option 1 would represent a relaxation of the restrictive approach currently operating in New Zealand, but a

⁶⁰ Extract from Emily Henderson and Fred Seymour, *Expert witnesses under examination in the New Zealand criminal and family courts* (The Law Foundation, 2013).

⁶¹ See, New Zealand Law Society, *Many expert witness problems are solvable* (NZ Law Society, 2013) available at: <<http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-816/many-expert-witness-problems-are-solvable>> accessed 14 December 2015.

⁶² Wang (1989) 4 CRNZ 674, 683. For an analysis of the problems this poses for primary victims see, Elisabeth McDonald, ‘Criminal Defences for Women’ in *Women in the Criminal Justice System* (New Zealand Law Society 1997) 46-9.

key issue in relation to option 1, is how broadly a lack of immediacy and/or use of force in excess of that involved in the harm or threatened harm ought to be construed.

In England and Wales, for example, a lack of imminence will not necessarily bar a successful self-defence claim.⁶³ Nor does the defendant have to ‘weigh to a nicety the exact measure of his defensive action’.⁶⁴ This does not mean that the primary victim will be able to avail themselves of an affirmative defence. In cases where the primary victim has caught an abuser off-guard and/or excessive force is used, the conduct will not fall within the parameters of the defence. In this respect, self-defence is an ‘all or nothing’ option in England and Wales. A stark illustration of the impact of this approach was provided in the controversial case of *Clegg*.⁶⁵ The case involved a British soldier on patrol in Northern Ireland who opened fire on the occupants of a stolen car that had failed to stop at a checkpoint. According to his evidence, the defendant believed that the life of his colleague on the opposite side of the road was in danger. He fired three shots at the windscreen of the car and a fourth shot at the side of the car as it was passing. The trial judge ruled that the final shot, which killed the rear-seat passenger, was not fired in self-defence. The certified question of law in *Clegg* was whether a soldier on duty, who kills a person with the requisite intention for murder, but who would be entitled to rely on self-defence, but for the excessive use of force, is guilty of murder or manslaughter.⁶⁶ The court considered that had Parliament intended to create a qualified defence in cases where the defendant uses excessive and unreasonable force in preventing crime it would have done so under s. 3 of the Criminal Law Act 1967. The court acknowledged the severity of its ruling⁶⁷ and the boundaries of jurisprudential precedent:

*I can find no escape from the conclusion that if a crime
was committed, it was murder if the shot was fired with*

⁶³ *Attorney General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105 (HL).

⁶⁴ *Palmer* [1971] AC 814; Criminal Justice and Immigration Act 2008 (E&W), section 76 (7).

⁶⁵ [1995] 1 AC 482, HL. This analysis of *Clegg* is derived from Nicola Wake, ‘Political Rhetoric or Principled Reform of Loss of Control? Anglo-Australian Perspectives on the Exclusionary Conduct Model’ (2013) *Journal of Criminal Law* 77(6) 512-542.

⁶⁶ *Clegg* *ibid*, 489.

⁶⁷ *ibid* 491-2.

*intent to kill or seriously wound. To hold that it could be manslaughter would be to make entirely new law. If a plea of self-defence is put forward in answer to a charge of murder and fails because excessive force was used though some force was justifiable, as the law now stands the accused cannot be convicted of manslaughter. It may be that a strong case can be made for an alteration of the law to enable a verdict of manslaughter to be returned where the use of some force was justifiable but that is a matter for legislation and not for judicial decision.*⁶⁸

Notwithstanding the problems associated with this ‘all or nothing’ approach, it remains less restrictive than the approach currently operating in New Zealand. If the recommended amendments are to make a real difference in practice, they must be supported with the use of social framework evidence in order to assist the criminal justice system in understanding why the primary victim believed that force was necessary (not necessarily immediate), and how the force used could be regarded reasonable (in light of the respective size of the parties) in the circumstances (namely, the history of abuse). It should also be borne in mind that amendments to self-defence alone will not always capture all deserving cases, and, for this reason, the introduction of a partial defence should form part of a comprehensive reform package.

- *Option 2: Amend section 48 to replace by statute the Wang concept of ‘imminence’ with inevitability.*

The concept of inevitability tends to operate well in hypothetical situations⁶⁹, but there may not always be such clarity regarding the threats of a predominant

⁶⁸ *ibid* 495 (citing Viscount Dilhorne).

⁶⁹ The example posited in *Lavellee* (n 31) (which follows) is designed to illustrate the absurdity of precluding mitigation in cases where the threat was inevitable, but it will not always be possible for the primary victim to demonstrate that she believed that her death would be the inevitable result of the predominant aggressor’s threats: ‘If the captor tells [the defendant] that he will kill her in three days’ time, it is potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until the third day? I think the question the jury must ask itself is whether, given the history, the circumstances and the

aggressor. It may be difficult to ascertain whether or not the attack ought to be regarded as inevitable. The concept of inevitability might encourage the use of problematic stereotypes. For example, the prosecution might argue that the defence ought not to be available because, ‘he had threatened her with her life many times before, but had never gone through with it’ and/or that ‘Everyone says things they don’t mean in the heat of the moment. She knew that he didn’t mean it.’ Threats of this nature are clear warning signs that there is a high risk to the primary victim, but when the court assesses inevitability the potential is that the threat to the primary victim could be underestimated and misunderstood.

The concept of inevitability could also be interpreted too widely. It is not clear how remote a threat will have to be before it is considered too remote. In disputes between neighbours, might it be enough to argue that violence was inevitable? Might a prisoner who has been warned that they are going to be attacked by another prisoner suggest that harm to their person was inevitable for the purposes of the defence? In gang-related violence cases, could members from one gang argue that it is inevitable that they would be attacked from members of the other gang?

- *Option 3: Introduce a new complete defence to extend the concept of self-defence to victims of family violence who act out of necessity.*

It is not appropriate to introduce an entirely new defence for a discrete category of offender, when other vulnerable offenders may be placed in the same or a similar situation, barring the familial dimension (see comments in response to question 1). The introduction of a separate defence would run the bipartite risk of primary victims being treated more favourably in some circumstances than other victims of abuse, whilst simultaneously marking their response as being less rationale than that of an individual acting in self-defence. The focus of self-defence should be on whether force was really necessary. As mentioned in response to option 1, the assessment should focus on whether the primary victim believed that force was truly necessary (not necessarily immediate). The

perceptions of the appellant, her belief that she could not preserve herself from being killed by [the deceased] that night except by killing him first was reasonable’; 899 (Wilson J).

introduction of social framework evidence, jury directions and a comprehensive education package could assist in this context.

Clarkson's defence of necessary action tailored to the circumstances of familial violence

Given that the assessment should focus on whether force was necessary, there may be a case for re-evaluating the current relationship between necessity, self-defence, duress by threats, and duress by circumstances. Clarkson has cogently argued that the 'clear demarcation' between duress and necessity 'is highly problematic and, further, distinguishing them from the defence of self-defence [is] equally problematic'.⁷⁰ A common thread runs through all of these defences; namely that 'the defendant committed the crime because of pressure or danger'.⁷¹ The actions of the defendant under each category, and where the defence is established, can be regarded as 'morally involuntary'.⁷² Recognition that the same thread underpins each defence, combined with the suggestion that the focus in these cases is not specifically upon the acts of the defendant (in order to assess whether the defendant may be excused) or upon the actions of the aggressor (in order to assess whether the response may be justified) effectively blurs 'the distinction between justification and excuse'.⁷³ Clarkson suggests:

In reality there is a continuum of pressurised conduct with it being impossible to distinguish clearly between the actor, who, in the situation, lives up to our expectation and 'the standard to which our characters should minimally conform'.⁷⁴

⁷⁰ Chris Clarkson, 'Necessary Action: A New Defence' [2004] Criminal Law Review 81-95, 81. See, generally, *Symonds* [1998] Crim LR 280; *Martin* (1989) 88 Cr App R 343; *Re A (Conjoined Twins); Surgical Operation* [2001] Fam 147; and, *Safi* [2003] EWCA Crim 1809.

⁷¹ Clarkson *ibid*, 84.

⁷² *ibid*.

⁷³ *ibid*, 85.

⁷⁴ *ibid*. Quote within quote; Clarkson citing John Gardner, 'The Gist of Excuses' [1998] 1 Buffalo Criminal Law Review 575.

The theoretical basis for maintaining separate defences is therefore diminished.⁷⁵ In light of this observation, Clarkson advanced an entirely new general defence of ‘necessary action’, on the basis that ‘if defendants under extreme pressure, whether because of an attack, threats of circumstances, are in reality acting for the same reasons and under the same level of pressure, the case for collapsing the present defences into a single broader defence becomes strong.’⁷⁶ Central to the proposed defence is the requirement that the force utilised is reasonable and proportionate.⁷⁷ The concept of imminence would simply be a factor to consider in assessing the reasonableness and proportionality of the defendant’s response, rather than being the determining factor that it is now. The departure from the concept of ‘immediacy’ recognises that an appreciation of the context of the defendant’s actions is essential in determining reasonableness and proportionality. This, as previously noted, is of fundamental importance in cases involving the primary victim:

*Under the new broad defence this issue would become rephrased: given her situation was it reasonable for her to take pre-emptive action and, given that situation, was the force used proportionate to the ‘danger’-with ‘danger’ being given a broader timeframe than the current law.*⁷⁸

Beyond assessment of the circumstances of the defendant, the proposed defence adopts an objective standard regarding whether the use of force is to be regarded excessive.⁷⁹ The effect is that physical characteristics (such as the respective size of the parties) may be considered, but psychological conditions cannot.⁸⁰ In the context of the primary victim, this would send a clear message that it is inappropriate to psychologise the circumstances of the primary victim. It remains

⁷⁵ *ibid*, 86. Clarkson also addresses further ‘(perhaps speculative)’ reasons for rejecting the argument that ‘the justification/excuse classification does not provide an adequate theoretical basis for distinguishing the defences’; *ibid*, 86.

⁷⁶ *ibid*, 89 and 82, respectively.

⁷⁷ *ibid*, 89.

⁷⁸ *ibid*, 90.

⁷⁹ *ibid*, 92. See also, *DPP v Armstrong Braun* (1999) 163 JP 271.

⁸⁰ *ibid*. See, generally, *Canns* [2005] EWCA Crim 2264; *Press and Thompson* [2013] EWCA Crim 1849; *Oye* [2013] EWCA Crim 1725. Cf. *Martin* [2002] 1 WLR 1.

important, however, that those circumstances are understood by the criminal justice system.⁸¹ For this reason, the proposed defence should be combined with appropriate juror directions and a specific clause relating to the admissibility of social framework evidence (considered further below).

The proposed defence draws duress, necessity and self-defence within its boundaries. The latter two may be most relevant to the primary victim, but the points made regarding human trafficking and ostensible gang membership (see response to qu 1) mean that there is a possibility that an individual in a family violence-type relationship may be particularly vulnerable to duress. Under the 'necessary action' defence, the only enquiry relates to the 'reasonableness and proportionality of the response to the threat or crisis'.⁸² In light of this contextual assessment, the defendant's prior fault does not preclude the availability of the defence, but it may cast doubt over the reasonableness of the defendant's response. This contextual analysis is important because it circumvents the current approach which automatically precludes the availability of duress on grounds of the defendant's prior fault in becoming involved in the gang; as previously noted, this is especially problematic for ostensible gang members.⁸³

There are, in limited circumstances, advantages to restricting defences based upon the actions of the defendant. The proposed defence ought to specifically exclude self-induced intoxication from the assessment of the circumstances.⁸⁴ This is arguably implicit from the objective test that requires that abnormal mental states should not be considered as part of the defence; an explicit statutory exclusion, however, would prevent unnecessary litigation in cases where the defendant is voluntarily intoxicated. This would not preclude the availability of the defence, but it would not allow intoxication to form part of the circumstances for consideration. The defence could also be excluded where the

⁸¹ As previously noted, in response to question 1, a review of offenders who are vulnerable as a result of mental ill health ought to be undertaken in New Zealand, but this is outside the parameters of the present review.

⁸² Clarkson (n 70) 93.

⁸³ See response to question 1.

⁸⁴ In England and Wales, voluntary intoxication is excluded for the purposes of mistaken belief in self-defence; Criminal Justice and Immigration Act 2008, section 76(5). See also, *Hatton* [2006] 1 Cr App R.

defendant intentionally incited serious violence (a point explored further in response to question 16).

If a new defence based upon necessity is considered, it ought to be of general application. A new defence of this nature is likely to emphasise the inconsistencies with the current defences, and, as such, Clarkson's defence of necessary action, combined with the suggested additions, provides a viable option for reform:

The present separate classifications of [duress, self-defence and necessity] has meant that they have developed in differently-but the differences in the rules are not necessarily rational or sustainable. A new defence of necessary action would have the advantage of simplicity and, most importantly, would enable the focus to be on the true issue that unites the present defences: whether, given the pressure/crisis, etc., facing the defendant, the response, taking into account the context and all the circumstances, was a reasonable and proportionate reaction to that danger.⁸⁵

Question 9: *Should option 1 be limited to situations where family violence is in issue or apply generally?*

Should Option 1 be recommended, the provision ought to apply generally. As previously noted, limiting the potential availability of an ostensibly broader self-defence provision may have unintended consequences for defendants who find themselves in a potentially analogous situation to vulnerable family members, but for failing to fall within that category. For example, in the context of human

⁸⁵ Clarkson (n 59) 95.

trafficking, third party abuse or other situations where ‘the threat is not immediate, but...more remote in time’ or arguably ongoing.⁸⁶

A similar approach to Option 1, which was limited to familial violence situations, was recently adopted in relation to self-defence in Victoria. Self-defence in Victoria requires that the defendant believed force was necessary in self-defence and that the conduct was reasonable in the circumstances as perceived by the defendant.⁸⁷ Amendments under section 322M of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 specify that, in cases involving family violence, self-defence may apply even where the threat is not imminent, or the force used is excessive. The key difference between Option 1 and the position in Victoria is that the extension of self-defence applies only in cases involving family violence, and in murder cases section 322K (3) mandates that the conduct was necessary in order to defend herself/another from death or really serious injury. Priest criticised the amendments as a ‘breathtaking extension’ of self-defence:

*Taken to their logical (or, perhaps, their illogical) conclusion, these new provisions suggest that a number of ‘trivial’ acts of ‘harassment’ (whatever the term might embrace) by a family member, which do not involve actual or threatened abuse, might permit a person to use disproportionate force to kill that family member even where ‘harm’ is not ‘immediate’.*⁸⁸

If the provisions are interpreted too broadly, there is a real risk that the defence would be available in unmeritorious cases. If the provisions are interpreted too narrowly, the amendments are unlikely to assist the primary victim. Notwithstanding Priest’s reservations regarding the revised provision in Victoria,

⁸⁶ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (VLRC, 2004) para 3.61.

⁸⁷ Crimes Act 1958 (Vic) section 322K, as amended by the Crimes (Abolition of Defensive Homicide) Act 2014.

⁸⁸ P Priest, ‘Defences to Homicide’ (2005) 8 cited in Australian Law Reform Commission, *Family Violence: A National Legal Response* (Australian Law Reform Commission No 114, 2010).

the extent to which the amendments will make a significant difference is doubted. In Victoria, the Judicial College has suggested that the common law approach regarding immediacy and the reasonableness of force used will continue to apply.⁸⁹ In practice, the provision reiterates that when acting in the ‘agony of the moment’ the defendant does not need to ‘weigh to a nicety the exact measure of his defensive action’.⁹⁰

Similar concerns were voiced regarding amendments to self-defence in householder cases in England and Wales. The revised provision states that where a defendant is protecting herself/another against a trespasser, force will only be regarded as unreasonable if it is ‘grossly disproportionate’.⁹¹ Elliott suggests that if ‘a literal interpretation is given to the legislation then disproportionate force would be interpreted as reasonable and therefore lawful’.⁹² The problem with this approach is that it places the householder in a better position than every other case of self-defence, where the defence will fail if the use of force was disproportionate. The rationale is sound in principle: the defence is extended to include the circumstances of the defence. In order to be entitled to an affirmative defence, however, the defendant’s conduct ought to be a proportionate response to the perceived threat otherwise a partial defence would be apposite in terms of the defendant’s culpability level.⁹³

The specific focus on householders in England and Wales has the potential to breach the principle of equality before the law.⁹⁴ If it is appropriate to consider

⁸⁹ Judicial College of Victoria, *Bench Notes: Statutory Self-Defence* (Judicial College of Victoria 2014).

⁹⁰ *Keane* [2010] EWCA Crim 2514 [3].

⁹¹ Criminal Justice and Immigration Act 2008, section 76(5A), as amended by the Crime and Courts Act 2013, section 43.

⁹² Catherine Elliott, ‘Interpreting the contours of self-defence within the boundaries of the rule of law, the common law and human rights’ (2015) *Journal of Criminal Law* 330, 331. Elliott observes: ‘Before the 2013 Act, the defence of self-defence was not available if a person used a disproportionate amount of force, as this was automatically an unreasonable violation of the sanctity of life. The amended s. 76 continues to limit the defence of self-defence to where reasonable force has been used but it adds that the amount of force used would be unreasonable if it were grossly disproportionate...the Act might be viewed as trying to change the very meaning of reasonableness to something different than proportionate’; 337.

⁹³ See, generally, Joshua Dressler, ‘New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking’ [1984] 32 *University of California, LA Law Review* 61.

⁹⁴ Elliott (n 92) 334.

the circumstances of the householder for the purposes of fact finder evaluation in self-defence cases, it is equally important, in terms of appropriate standardisation and distributive justice, to acknowledge the invasion of psychical and psychological integrity caused by domestic violence.⁹⁵ The Government of England and Wales also considered amendments to the law on self-defence to afford leniency to soldiers and the police, given the increased risk of threat towards them and the fact that they might be armed, although this was not taken forward.⁹⁶ It is fundamentally important that the law applies equally to everyone, and that specific categories of vulnerable offender are not singled out for preferential treatment, notwithstanding the harrowing nature of individuated contextual analyses.

Elliot suggests that the law in England and Wales ought to depart from a literal interpretation of the statute. The provision does not stipulate that ‘only grossly disproportionate force will be unreasonable. Judges are, therefore, entitled to conclude that while grossly disproportionate force is clearly unreasonable, disproportionate force which is not grossly disproportionate force can also be unreasonable.’⁹⁷ A failure to do so, is likely to render the law incompatible with Article 2 of the European Convention of Human Rights.⁹⁸ Herring has also pointed out that the revision makes ‘little change to the law because the jury would, even under the standard approach, take into account the emergency of the moment when considering whether a householder was acting reasonably and would be likely to only find a grossly disproportionate amount of force to be unreasonable’.⁹⁹ In this regard, the clause has been heavily criticised as a ‘triumph of rhetoric over reason’ and it highlights the dangers of enacting legislation that may do little to change the substantive approach. It also illustrates the problems associated with prioritising specific categories of vulnerable offender over others.

A related problem arises where amendments to self-defence are viewed as

⁹⁵ Wells (n 59).

⁹⁶ Elliott (n 92) 334.

⁹⁷ *ibid.*

⁹⁸ Elliott (n 92).

⁹⁹ Jonathan Herring, *Criminal Law: Texts, Cases and Materials* (Oxford University Press, 2014) 646.

‘solving the problem’. It is clear that even with amendments to the present law on self-defence, there will still be deserving cases that remain outside the ambit of the provision (see the analysis of *Clegg* in response to qu 8); there remains a clear need for a partial defence (this is considered further in response to qu 15).

Question 10: *Should reforms be introduced to provide specific guidance on the admissibility of family violence evidence when self-defence is raised in the context of family violence?*

These specific reforms should not be limited to self-defence, but other defences/potential partial defences to which guidance on the admissibility of family violence evidence may be necessary. This would assist in addressing current misconceptions within the criminal justice system regarding the impact of familial violence.

Question 11: *Should such guidance be contained in the Crimes Act 1961 or the Evidence Act 2006?*

Given that the issue is a matter of evidence rather than a substantive law principle, it makes sense to include guidance on social framework evidence in the Evidence Act 2006.

Question 12: *Should reforms be introduced to provide for jury directions where self-defence is raised in the context of family violence?*

Social framework evidence and jury directions pertaining to familial violence should not be seen as either/or options, but rather part of a comprehensive reform package. Amendments to the current law ought to be complemented by new jury directions designed to assist jurors to understand the impact of abuse, and how this can evoke ‘possibly the worst behaviour from everybody in an unbelievably hot-tempered, violent home where domestic family violence is prevalent’.¹⁰⁰ The trial judge ought to be required to provide a direction on family violence where it

¹⁰⁰ Hansard, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic), second reading, 3 September 2014, Mr McCurdy, Murray Valley, 3138 and 3146.

is requested by counsel, unless there are good reasons not to. In cases where no request is made, but the trial judge is of the view that a direction on family violence ought to be issued, directions should be provided. Specific jury directions would assist in proactively tackling misconceptions regarding the impact of family violence. The trial judge should also be able to tailor the jury directions as they apply to each individual case.

Question 13: *Should any jury direction be focussed on addressing common misunderstandings of family violence (the Victorian model) or on directing a jury on how the concepts of imminence and proportionality apply in each individual case?*

In cases where a family violence direction is provided, it makes sense to also highlight the impact that family violence might have in the context of self-defence. As previously noted, the focus should not be on whether the threat was imminent, but rather on whether the use of force was necessary, in the light of information provided, and in particular, where the defendant has acted in response to familial violence. In the context of whether force was proportionate, that familial violence should be considered in addition to the respective sizes of the parties, etc. As mentioned previously, what may be deemed proportionate in cases involving two strangers of comparable size and strength is likely to differ significantly from what may be deemed proportionate between two individuals of disparate size where there is a history of familial abuse. The jury directions ought to be flexible enough to address the issue of necessity and proportionality in the context of familial violence.

CHAPTER 8: PARTIAL DEFENCES AND SEPARATE HOMICIDE OFFENCES

Question 14: *Should a new partial defence (or separate homicide offence)-whether or general application or specific to victims of family violence-be introduced in New Zealand?*

Yes.

Question 15: *Would you support the introduction of a new partial defence or separate homicide offence if it applied only in circumstances where the victims of family violence commit homicide?*

There is clearly a need for a new partial defence (or homicide offence) for those who kill in response to a fear of serious violence, but are unable to claim self-defence. As previously noted, the rationale for the defence should be that the defendant experienced a situation causing them to fear serious violence, and their conduct is either justified or excused on that basis, depending upon the specific nature of the partial defence (or homicide offence). The exclusion of individuals experiencing the same emotions, in potentially analogous situations, but for the lack of a familial link cannot be justified. There is added concern that a stigma will attach to a specific partial defence (homicide offence) suggesting that the primary victim has a licence to kill or alternatively that cases involving family violence will be shoehorned into the partial defence (on the basis that it is a family violence defence) in cases where self-defence ought to be available. Nevertheless, the current position is unacceptable and in the absence of a general partial defence (or homicide offence), a specific partial defence (or homicide offence) would be preferable to none at all.

Question 16: *If a new partial defence is introduced, would you favour a partial defence based on one of the traditional defences of excessive self-defence, loss of control or diminished responsibility, or a specific defence of self-preservation in the context of an abusive relationship?*

A brief assessment of each of the recommended defences is outlined below, followed by proposals for an entirely new defence.

Excessive self-defence

Excessive self-defence is problematic for the primary victim due to the requirement that the force used must be regarded necessary. In practical terms, this requirement will likely bar self-defence and/or excessive self-defence claims in cases of this context. This is because the threat will usually be anticipated, but not sufficiently imminent in order to justify raising either defence. As previously

noted, a reinterpretation of necessity is required in such cases. As the law stands, however, excessive self-defence in current iterations operating in other jurisdictions is often inadequate to accommodate this type of case.

Diminished responsibility

Diminished responsibility is usually not appropriate in cases involving primary victims who kill a predominant aggressor. This is because raising diminished responsibility potentially involves the psychologising of the primary victim.¹⁰¹ Although familial abuse may induce mental ill health it does not always do so; in the absence of a recognised medical condition, it would not be possible for the primary victim to raise the partial defence. Furthermore, it is inherently unfair to label the primary victim's response in killing a predominant aggressor irrational rather than understandable in the circumstances.

Loss of control

Loss of control is not an appropriate defence for the primary victim. The loss of self-control requirement is incompatible with a response motivated by fear. The term has been criticised as ambiguous, lacking a clear basis in science or medicine, and failing to appreciate the true reality of domestic violence.¹⁰² The loss of control requirement has always been a particularly difficult aspect of the partial defence for primary victims who kill, since a primary victim is much less likely to lose self-control when they know it is likely they will 'come off worse' as a result.¹⁰³ In reality, the loss of self-control requirement is more suited to angry altercations than instances where the primary victim responds in fear. As Fortson observes:

*The [loss of control] defence will (...) not benefit persons
who, without losing their self-control, kill their abuser,*

¹⁰¹ See, for example, *Ahluwalia* (1993) 96 Cr App R 133 (E&W).

¹⁰² See, Alan Reilly, 'Loss of Self-Control in Provocation' [1997] 21 Criminal Law Journal 320, 330; Law Com No 290, 2004 (n 3) para 3.28, *ibid*; NSW LCSC, 2013 (n 59) paras 4.97-4.118.

¹⁰³ Law Com No 290, 2004 (n 3) para 3.28.

*regardless of the frequency and/or intensity of the abuse.*¹⁰⁴

Self-preservation

A preferable approach would be to introduce an entirely new partial defence based upon self-preservation.¹⁰⁵ This bespoke provision ought not to be limited to those who kill in the context of an abusive relationship for the reasons set out in response to question 1, above. An entirely new partial defence is recommended below. The novel provision draws upon earlier recommendations of the Law Commission for England and Wales, in addition to an in-depth review of the operation of sections 54 and 55 of the Coroners and Justice Act 2009, as enacted. A full draft of the defence, followed by detailed explanatory notes, is provided below:¹⁰⁶

1A (1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if—

(a) D’s acts and omissions in doing or being a party to the killing were in response to D’s fear of serious violence from V against D or another identified person, and

(b) a person of D’s age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) In subsection (1)(b) the reference to “the circumstances of D” is a reference to all of D’s

¹⁰⁴ See, Rudi Fortson QC, 'Homicide Reforms under the CAJA 2009' (Criminal Bar Association, 2010) para 184.

¹⁰⁵ See Wake, 'Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives' (n 5). 'Self-defence as a win or -lose-option...encourages the use of partial defences of [loss of self-control] and diminished responsibility when neither properly captures the nature of the dilemma in which battered women find themselves. A compromise move would be the development of a new partial defence based on physical or psychological aspects, or self-preservation;' Wells (n 59) 275.

¹⁰⁶ This provisional partial defence was outlined in Wake, 'His home is his castle. And mine is a cage': a new partial defence for primary victims who kill' (n 55).

circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(3) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(4) For the purposes of subsection (3), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(5) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

1B Meaning of "fear of serious violence"

(1) This section applies for the purposes of section 1A.

(2) Whether D feared serious violence is entirely subjective.

(3) The fear must be genuine but it need not be reasonable.

(4) The term violence includes psychological, sexual, and physical harm.

(5) For the purposes of subsection 1A (1)(b) the effects of voluntary intoxication on the part of D are excluded.

(6) Subsection 1A does not apply if, in doing or being a party to the killing D:

(a) acted in a considered desire for revenge; and/or

(b) intentionally incited serious violence from V.

(7) Subsection 1B(6)(b) does not apply where D's conduct merely incited a response from V. D's conduct must be

undertaken for the purpose of inciting serious violence on the part of V.

EXPLANATORY NOTES¹⁰⁷

Introductory notes

In cases where sufficient evidence is raised to demonstrate that the partial defence might apply, it is for the prosecution to disprove the defence beyond all reasonable doubt. The partial defence would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious violence from the victim against the defendant or another identified individual.¹⁰⁸ The partial defence is qualified by appropriate threshold filter mechanisms designed to preclude the availability of the defence in unmeritorious cases. These include: a normal person test and provisions stipulating that the defence is not available where the defendant intentionally incited serious violence, acted in a considered desire for revenge, or on the basis that no jury, properly directed, could reasonably conclude that the partial defence might apply.¹⁰⁹

APPLICATION OF THE DEFENCE

Fear of serious violence

The proposed defence requires that the defendant feared serious violence from the victim against the defendant or another identified individual. This mirrors the ‘fear trigger’ currently operating under the loss of control defence in England and Wales.¹¹⁰ The defence is designed to be available where the defendant kills in response to an anticipated (albeit not imminent attack); and where the defendant over-reacts to what she perceived to be an imminent threat.¹¹¹ This circumvents the problem associated with establishing that force was necessary in the context of excessive self-defence, identified above. The fact that the threat may be targeted towards the defendant or another identified individual is particularly important, given that primary victims may act in defence of their

¹⁰⁷ These explanatory notes are derived from Wake *ibid*.

¹⁰⁸ Provision included in the Coroners and Justice Act 2009 (E&W), section 54(3).

¹⁰⁹ See, generally, sections 54(5)-(6) of the Coroners and Justice Act 2009 (E&W).

¹¹⁰ Coroners and Justice Act 2009, section 54(3) (E&W).

¹¹¹ Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (MoJ CP19/08, 2008) (E&W) para 28.

children as well as themselves. Whether the defendant feared serious violence engages an entirely subjective enquiry.¹¹² The fear must be genuine but it need not be reasonable. Arguably, it would be difficult to prove that the fear was genuine if it were not based on reasonable grounds. There is no need to extend the defence to circumstances falling short of serious violence, but social framework evidence should be utilised to explain why an ostensibly trivial incident might cause the primary victim to fear such violence.¹¹³ The term violence should be broadly construed as including psychological¹¹⁴ and sexual harm, in addition to physical violence.¹¹⁵

It is worth reiterating here, that the number of cases in which the primary victim kills an intimate partner is limited. It is more common for defences and partial defences to be invoked in cases involving male-on-male violence.¹¹⁶ This is not to say that in some cases, these defendants should not be able to avail themselves of a defence. It is clear, however, that any defence must be robust enough to exclude unmeritorious cases. Fortson posits the following example:

*Suppose D, who is engaged in a drug war with V, loses his self-control and (in fear of serious violence from V) kills the latter. If D's conduct meets the requirement [that the defence raise an issue with which the defence might apply], his partial defence to murder seems likely to succeed.*¹¹⁷

¹¹² '[T]he reasonableness requirement is out of place when we are thinking of people who are acting out of fear or anger and are therefore likely to be in a somewhat emotional state'; Law Com No 290, 2004 (n 3) para 3.154.

¹¹³ Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) (E&W) para 5.55.

¹¹⁴ It might be worth including an additional clause explaining the nature of psychological abuse. For example, Psychological abuse need not 'involve actual or threatened physical or sexual abuse' and may include (i) intimidation; (ii) harassment; (iii) damage to property; (iv) threats of physical abuse, sexual abuse or psychological abuse; Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic), section 322J.

¹¹⁵ See, Fortson (n 104) para 90. The Law Commission did not feel it necessary to include a clause explaining the 'fear of serious violence' element of the partial defence; given the confusion around family violence, it might be useful to have a specific clause, or, alternatively, to adapt the admissible social framework evidence in order to assist in interpreting the evidence in family violence cases; Law Com No 304, 2004 (n 113) para 5.55.

¹¹⁶ K. O'Donovan, 'Defences for Battered Women Who Kill' (1991) *Journal of Law and Society* 18, 219.

¹¹⁷ Fortson (n 104) para 164.

This category of case demonstrates how important it is that appropriate threshold filter mechanisms operate in relation to the advanced partial defence. The threshold filter mechanisms considered below would be capable of filtering out the type of case envisaged by Fortson.

The 'normal person' test

The proposed defence is qualified by the 'normal person' test, which mandates that a person, of the defendant's age, with a normal degree of tolerance and self-restraint, and in the circumstances of the defendant might have reacted in the same or a similar way.¹¹⁸ Critics have suggested that the 'normal person' test is problematic because it involves 'speculation about how a person *might have* reacted in the circumstances'.¹¹⁹ This approach is necessary because it is impossible to say how a person *would have* reacted in the circumstances, particularly where there is evidence of familial abuse.¹²⁰ The proposed test is similar to the 'normal person' test operating in relation to the loss of control defence, with the exception that the term 'sex' is omitted. Use of the term 'sex' overstates the 'role of sex and gender in explaining D's reaction'.¹²¹ In this respect, sex and gender are more appropriately to be considered by the judge and jury as part of the broader circumstances of the case.¹²² Akin to the loss of control defence, circumstances in this context is a reference to all of the defendant's circumstances other than those whose only relevance to the defendant's conduct is that they bear on her general capacity for tolerance and self-restraint.¹²³ In cases where the defendant has a recognised medical condition relevant to her fear of serious violence then that might, like sex and gender, form part of the circumstances for consideration.¹²⁴ A normal degree of tolerance means that, in evaluating the defendant's conduct, the jury cannot take into

¹¹⁸ Coroners and Justice Act 2009, section 54(1)(c) and (3).

¹¹⁹ VLRC (n 86) para 3.84 [emphasis in the original].

¹²⁰ Fortson (n 104) para 148. Although cf. Jo Miles, 'A Dog's Breakfast of Homicide Reform' Archbold News (2009) issue 6, 8.

¹²¹ Neil Cobb and Anna Gausden, 'Feminism, "Typical" Women, and Losing Control' in Alan Reed and Michael Bohlander (eds) in *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, 2011) ch 7.

¹²² *ibid.*

¹²³ Coroners and Justice Act 2009, section 54(3).

¹²⁴ *Asmelash* [2013] EWCA Crim 157.

account irrational prejudices, such as racism, and homophobia.¹²⁵ A normal degree of self-restraint excludes characteristics such as bad temper, jealousy, irritability and intoxication. In England and Wales, the Court of Appeal have adopted a restrictive interpretation of the ‘normal person’ test, by intimating that an ordinary person would not act in the same or a similar way to a gang member.¹²⁶

Exclusionary clauses

The proposed defence specifically excludes self-induced intoxication from the assessment of the defendant's capacity for tolerance and self-restraint.¹²⁷ This statutory exclusion is designed to prevent unnecessary litigation in cases where the defendant is voluntarily intoxicated.¹²⁸

The defendant's fear of serious violence is to be disregarded in cases where the defendant intentionally incited serious violence.¹²⁹ The intentional incitement clause is different the loss of control defence operating in England and Wales which stipulates that the defence will be unavailable where the defendant incited something to be said or done for the *purpose* of using it as an excuse to use violence. In analysing the provision in England and Wales, the Court of Appeal in *Dawes, Hatter & Bowyer*, held that the mere fact that the defendant was, 'behaving badly and looking for and provoking trouble' does not mean the defence is unavailable.¹³⁰ This is because self-induced triggers are viewed in a narrow sense only for the purposes of the loss of control defence.¹³¹ The exclusion will arguably only apply where the defendant has ‘formed a premeditated intent to kill or cause grievous bodily harm to the victim, and incites provocation by the victim so as to provide an opportunity for attacking him or her’.¹³² This approach was applied in *Duncan*¹³³, where a defendant

¹²⁵ Coroners and Justice Act 2009, section 54(1)(c).

¹²⁶ *Gurpinar & Kojo-Smith* [2015] EWCA Crim 178.

¹²⁷ *ibid.*

¹²⁸ *Asmelash* (n 124).

¹²⁹ ‘One may wonder (and the judge would have to consider) how often a defendant who is out to incite violence could be said to ‘fear’ serious violence; often he may be welcoming it’; *Dawes, Hatter & Bowyer* (n 5) [58].

¹³⁰ *Dawes, Hatter & Bowyer* (n 5)[58].

¹³¹ Law Com No 204, 2004 (n 3) para 3.139.

¹³² *ibid.*

successfully claimed the partial defence after stabbing a love rival to death. Duncan was shopping with his two children when he saw the victim. As a result of seeing him, Duncan purchased a small bladed paring knife, removed the packaging and concealed it within a carrier bag. His explanation was that some days before the victim had confronted him in a similar location and threatened him with a knife. According to witnesses, Duncan then proceeded towards the victim shouting at him. A fight ensued, during the course of which, the victim slashed Duncan across the face and body with a knife. It was at that point, Duncan claimed to have momentarily lost self-control and stabbed the victim to death. Duncan's loss of control plea was accepted by the Crown, Lord Thomas advocating that the case should be seen;

*As an acceptance of a basis of plea in a one-off case in circumstances which we have not gone in to. It should not be regarded as any precedent that where two people arm themselves and a wound is caused in the course of an intended knife fight, that that would ordinarily give rise to a loss of self-control.*¹³⁴

Despite the warning of Lord Thomas, the case illustrates that the circumstances in which a defendant's conduct might be construed as having been done for the purpose of using it as an excuse to use violence are likely to be limited. The Commission opined that to exclude the defence 'in the broader sense of self-induced provocation would be to go to far'.¹³⁵ Such an approach might exclude deserving claims where the incitement was induced by 'morally laudable' conduct, for example, 'standing up for a victim of racism in a racially hostile environment'.¹³⁶ The Commission did identify that, 'there is much to be said...in denying a defence to criminals whose unlawful activities expose them to the risk of provocation by others'.¹³⁷ The recommended intentional incitement clause

¹³³ *Duncan* [2014] EWCA Crim 2747.

¹³⁴ *ibid* [11].

¹³⁵ Law Com No 204, 2004 (n 3) para 3.139.

¹³⁶ *ibid*.

¹³⁷ *ibid*.

provides a *via media* between these ostensibly polarised approaches to self-induced provocation.

The provision would operate where the defendant *intentionally incited serious violence*. The defendant's conduct must be done for the *purpose* of inciting serious violence. In this respect, the 'mere fact that the defendant caused a reaction in others' would not result in the defence being excluded.¹³⁸ The approach adopted in *Dawes, Hatter & Bowyer*, that provocative behaviour does not negate the defence is equally applicable to the new proposal. This ensures that confrontational circumstances do not automatically preclude the partial defence, but where the defendant intends to incite serious violence, the defence is precluded.¹³⁹ This is important as the primary victim may feel responsible for inciting the aggressor's response, because she is aware that doing X makes him angry, but it cannot be said that it was her *intention* to have that effect. Contrary to the Law Commission's (E&W) observation, judges and jurors would be in a position to 'differentiate satisfactorily between forms of self-induced provocation in the broader sense which should, and which should not, preclude a defence'.¹⁴⁰ It is true that this would be a challenging task, given the potential variables, but the exclusionary clause operating in England and Wales serves little purpose when viewed in the narrow sense, particularly due to section 54(4).

Section 54(4) provides that the loss of control defence is not available where the defendant acted in 'a considered desire for revenge'. This element of the defence forms part of the proposed framework.¹⁴¹ The clause operates to prevent the use of the defence in pre-meditated, cold-blooded killings, but it does not preclude the defence simply because the defendant was angry with the victim for conduct

¹³⁸ *Johnson* [1989] EWCA Crim 289 (CA) (Watkins LJ.) The CA in *Dawes, Hatter & Bowyer* (n 5) noted that, 'the impact of R v Johnson is now diminished, but not wholly extinguished by the new statutory provisions'; [58].

¹³⁹ This is in line with the Law Commission's recommendation that the defence 'must not have been engineered by him or her through inciting the very provocation that led to it'; Law Com No 304, 2006 (n 113) para 5.20. See also, MoJ CP19/08, 2008 (n 111) para 27. See, generally, Law Com No 204, 2004 (n 3) para 3.139.

¹⁴⁰ Law Com No 204, 2004 (n 3) para 3.139.

¹⁴¹ Coroners and Justice Act, section 54(4).

which engendered a fear of serious violence.¹⁴² The Royal College of Psychiatrists noted that:

*Physiologically anger and fear are virtually identical, whilst many mental states that accompany killing also incorporate psychologically both anger and fear...[T]he abused woman who waits until the man is 'helpless' is likely, not merely to be angry but also fearful that he will eventually kill her, and/or her children and that there is no way of preventing it other than by the death of the man.*¹⁴³

The word “considered” denotes something over and above simple revenge,¹⁴⁴ and, as such, the primary victim who claims ‘he deserved it!’ remains eligible to claim the defence because jurors are in a position to distinguish genuine cases involving an element of retaliation from disingenuous claims.¹⁴⁵ Nevertheless, it may be difficult ‘to determine whether the killing was one motivated by a considered desire for revenge or from other emotions’, and, for this reason, social framework evidence should be used to explain why the primary victim may experience a complex array of emotions at the time of the fatal act.¹⁴⁶

The proposed legislative framework does not include the loss of self-control requirement, which is integral to sections 54-55 of the 2009 Act in England and Wales.¹⁴⁷ By avoiding this controversial requirement, the proposed partial defence is closely aligned with self-defence. In cases where self-defence fails, the new partial defence might apply. At present, in England and Wales, a defendant claiming self-defence may raise self-defence and loss of control.¹⁴⁸ In

¹⁴² Law Com No 204, 2004 (n 3) para 3.137; Law Com No 304, 2006 (n 113) para 5.11.

¹⁴³ Law Commission, *Partial Defences to Murder* (Law Com CP No 173, 2003) para 3.99.

¹⁴⁴ *Evans* [2012] EWCA Crim 2 (Christopher Clee QC).

¹⁴⁵ Law Com No 204, 2004 (n 3) para 1.137.

¹⁴⁶ David Ormerod, *Smith and Hogan's Criminal Law* (Oxford University Press, 2011) 511.

¹⁴⁷ This approach was recommended by the Law Commission, but rejected by the government; Law Com No 304, 2006 (n 113) para 5.55.

¹⁴⁸ *Wake* (n 4) 434. It is possible to raise both defences simultaneously, but in *Dawes*, *Hatter & Bowyer* (n 5), the Court of Appeal advocated that it is preferable to consider self-defence first.

Dawes, Hatter & Bowyer¹⁴⁹, Lord Judge CJ advised of the approach to be adopted:

The loss of control defence is not self-defence, but there will often be a factual overlap between them. It will be argued on the defendant's behalf that the violence which resulted in the death of the deceased was, on grounds of self-defence, not unlawful. This defence is now governed by s.76 of the Criminal Justice and Immigration Act 2008. In the context of violence used by the defendant there are obvious differences between the two defences and they should not be elided. These are summarised in Smith and Hogan, Edition, at p 135. The circumstances in which the defendant, who has lost control of himself, will nevertheless be able to argue that he used reasonable force in response to the violence he feared, or to which he was subjected, are likely to be limited. But even if the defendant may have lost his self-control, provided his violent response in self-defence was not unreasonable in the circumstances, he would be entitled to rely on self defence as a complete defence. S.55(3) is focussed on the defendant's fear of serious violence. We underline the distinction between the terms of the qualifying trigger in the context of loss of control with self-defence, which is concerned with the threat of violence in any form. Obviously, if the defendant genuinely fears serious violence then, in the context of self-defence, his own response may legitimately be more extreme. Weighing these considerations, it is likely that in the forensic process those acting for the defendant will advance self-defence as a complete answer to the murder charge, and on occasions, make little or nothing of the

¹⁴⁹ Dawes, Hatter & Bowyer (n 5) [59].

defendant's response in the context of the loss of control defence. As we have already indicated, the decision taken on forensic grounds (whether the judge believes it to be wise or not) is not binding on the judge and, provided the statutory conditions obtain, loss of control should be left to the jury. Almost always, we suggest, the practical course, if the defence is to be left, is to leave it for the consideration of the jury after it has rejected self-defence.

The problem is that the defendant will have to revert from alleging that she was acting reasonably in the circumstances, to asserting that she lost self-control. This is apt to cause juror confusion.¹⁵⁰ Rejection of the loss of self-control requirement also avoids the inherent contradiction in requiring the primary victim to simultaneously fear serious violence and lose self-control. For these reasons, loss of self-control does not form part of the proposed defence.

The loss of self-control requirement was introduced by the government of England and Wales in order to prevent the defence from being used inappropriately in cases of cold-blooded, gang-related¹⁵¹ or honour killings.¹⁵² A review of jurisprudential authority suggests, however, that a significant number of loss of control claims are being filtered out *unnecessarily* by the loss of self-control element. It is right that these claims are being rejected, but the loss of self-control requirement is unnecessary because these claims could be filtered out by the alternative threshold filter mechanisms within the partial defence. As previously stated, loss of control and the newly proposed defence are unavailable

¹⁵⁰ *ibid* 438. See also, Fortson (n 104) paras 166-168.

¹⁵¹ As noted in response to question 1, it is potentially problematic to assume that entire categories of individual are motivated for the same purpose. Individuals in a gang may have become members unintentionally by becoming involved in a relationship with a gang member. Other vulnerable individuals, who have been subjected to abuse and repeatedly let down by the system, may be promised protection by a gang only to realise that they are regarded as subordinates, indebted to the gang, and unable to escape. This is not to suggest that gang-related killings should be accepted or condoned, but that there is an inherent danger in assuming that every ostensible gang member voluntarily joined the gang, with foresight of the potential ramifications of gang membership, particularly in the context of women who have been abused.

¹⁵² MoJ CP19/08, 2008 (n 111) para 36.

where the defendant ‘acted in a considered desire for revenge’.¹⁵³ Lord Judge CJ, in *Evans*, advocated that there ‘was no need to rewrite...the language of the statute’.¹⁵⁴ In all cases, ‘the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self-control’.¹⁵⁵ The ‘considered desire for revenge’ exclusion is a more appropriate instrument for filtering out unmeritorious claims, because unlike the loss of self-control mandate, the ‘words “considered”, “desire” and “revenge” are not words of legal technicality. They are words of ordinary use’.¹⁵⁶

The trial judge, in *Jewell*¹⁵⁷, refused to leave the partial defence to the jury where the defendant prepared firearms and a survival kit twelve hours before he drove to the victim’s home, armed with a shotgun and home-made pistol, and shot him without warning.¹⁵⁸ Jewell’s explanation was that he feared serious violence from the victim who had threatened to kill him the evening before. The killing ‘bore every hallmark of a pre-planned, cold-blooded execution’.¹⁵⁹ There was a twelve-hour ‘cooling period’ between the alleged threat and the actual killing where Jewell could have sought an alternative course of action, but failed to do so. The defence, however, was negated not by virtue of section 54(4), but by the loss of self-control requirement. The trial judge considered the remaining elements of the defence ‘out of an abundance of caution’ but that assessment was ‘unnecessary as a dispositive conclusion’.¹⁶⁰

The extent to which the loss of self-control requirement impacts upon the utility of the alternative threshold filter mechanisms within the defence was similarly highlighted in the case of *Barnsdale-Quean*.¹⁶¹ The defendant had purchased a rolling pin and chain two weeks prior to the killing. On the day of the killing, he collected the chain from a flat in which he had stored it and the rolling pin from the kitchen. He tied two elasticated bands in a loop at the end of the chain, and

¹⁵³ Coroners and Justice Act 2009, section 54(4).

¹⁵⁴ *Evans* (n 144) [131].

¹⁵⁵ *ibid* [10].

¹⁵⁶ *ibid* (Andrew Edis QC and Simon Waley).

¹⁵⁷ *Jewell* [2014] EWCA Crim 414.

¹⁵⁸ *ibid* [43].

¹⁵⁹ *ibid* [43].

¹⁶⁰ *ibid* [47].

¹⁶¹ *Barnsdale-Quean* [2014] EWCA Crim 1418.

carefully placed it over his wife's head while she was subdued due to antidepressant medication. He used the rolling pin as a tourniquet to strangle his wife to death before stabbing himself in an attempt to make it appear that she had committed suicide after attacking him. Barnsdale-Quean claimed that he could not remember what had occurred following his wife's alleged attack. The trial judge ruled that there was no loss of self-control on the facts or the defendant's account. In the event that the defendant had lost self-control, the defence would be negated by virtue of section 54(4). The Court of Appeal advocated that it was unnecessary to reach a conclusion in respect of section 54(4), because there was no evidence of loss of self-control. These rulings demonstrate that section 54(4) is capable of filtering out unmeritorious cases in the absence of the loss of self-control requirement.

In all cases, should the outlined threshold filter mechanisms of the proposed defence be bypassed, the trial judge has the authority to reject a claim on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.¹⁶² This aspect of the defence relates to sufficiency of evidence. The Court of Appeal in England and Wales has repeatedly advocated that there must be sufficient evidence of all elements of the loss of control defence, including the normal person test.¹⁶³ This approach has been criticised on the basis that the legislation mandates that, 'sufficient evidence is adduced to raise *an issue* with respect to the defence', and not that evidence must be raised in relation to all elements of the defence.¹⁶⁴ It is unclear how an individual might produce evidence as to whether they acted as a 'normal person' might have acted in the circumstances, and for this reason it has been argued that the defendant ought not to be required to provide evidence that a 'normal person' might act in the way

¹⁶² Coroners and Justice Act 2009, section 54 (5)-(6). '[I]n many mixed motive cases the judge might take the view that, even if there is no 'considered desire for revenge', it is nonetheless a case where no reasonable jury would find that the defence applies. We regard it as significant that of the provocation cases studied...in the two involving honour killing both the accused were convicted of murder. We are confident that that result would be no different under our recommendations'; Law Com No 304, 2006 (n 113) para 5.27. See also, paras 5.11(5), 5.25-5.32, and 5.60.

¹⁶³ *Clinton* [2012] EWCA Crim 2 [45], *Dawes, Hatter & Bowyer* (n 5) [49] and [53]. *Gurpinar* (n 126)[12] and [22].

¹⁶⁴ Tony Storey, *Loss of Control: "Sufficient Evidence"*. The Journal of Criminal Law (2015) 79 (1) 6-8.

that the defendant did.¹⁶⁵ It is clear, however, that where the evidence raised demonstrates that an individual would clearly not react in the same or a similar way, the trial judge ought to reject the defence.¹⁶⁶ This was the approach envisioned by the Law Commission when it advanced proposals for reform:

*We would not, for example, want a partial defence to be available to criminal gangs who choose to deal with threats of violence from rival gangs by striking first. Our proposals regarding the role of the judge and jury would properly preclude such a defence from being left to the jury in those circumstances (on the basis that no properly directed jury could reasonably conclude that a gangster who chose to act in such a way could satisfy the objective test.*¹⁶⁷

Evidential matters

In cases where family violence is in issue, the trial judge will be charged to issue juror directions equivalent to those operating in relation to self-defence in Victoria (see Appendix C of the Issues Paper). The difference between the position in Victoria and the recommendations advanced is that these directions ought to be mandatory. This will ensure that appropriate directions are consistently provided in all cases, rather than relying on *ad hoc* requests made by counsel.

In all cases where family violence is at issue, social framework evidence will be *prima facie* admissible. Again, the social framework evidence advanced ought to be based upon the provisions operating in Victoria. A caveat applies in that the trial judge has general exclusionary discretion to prevent the admission of evidence that unnecessarily demeans the victim, considered above.

Procedural matters

¹⁶⁵ *ibid.*

¹⁶⁶ Fortson (n 104) para 179.

¹⁶⁷ Law Com No 290, 2004 (n 3) cited in Fortson (n 104) para 164.

The loss of control defence in England and Wales have given rise to significant litigation where the trial judge has failed to leave the partial defence to the jury. In order to avoid unnecessary litigation, a plea under the proposed defence would be considered as part of a pre-trial hearing under case management processes. The implementation of an interlocutory appeal route would mean that the trial judge's decision (to reject the plea) could be challenged (only) before trial, thereby preventing unnecessary appellate court litigation.¹⁶⁸

Question 17: *As an alternative, would you prefer the introduction of a separate homicide offence in circumstances where the defendant was acting defensively, but with excessive force?*

A separate homicide offence carries the significant benefits of more accurately labelling the actions of the defendant, and the availability of an alternative offence may reduce overcharging. Referring to defensive homicide, the Issues Paper suggests that, based upon the experience in Victoria, 'if such an offence is to be publicly acceptable, it should be limited to victims of domestic violence who commit homicide.'¹⁶⁹ A fundamental issue with the operation of defensive homicide was that its parameters were too broad. It is therefore essential that any separate homicide offence is appropriately restricted, but this does not necessarily mean that it should be limited to familial violence, for the reasons outlined in response to question 1. It should also be borne in mind that limiting any new offence to familial violence will not necessarily prevent the defence being used inappropriately. The terms 'family violence' and 'family violence' are broad terms, meaning that a wide 'cohort of persons and circumstances' may fall within the ambit of a new offence targeted towards these categories.¹⁷⁰ As previously noted, limiting any offence/defence to cases involving family violence does not mean that the offence/defence will not be invoked by individuals who should not be entitled to it; appropriate threshold filter mechanisms are required in order to ensure that future reforms are not abused.

¹⁶⁸ Law Com No 304, 2006 (n 113) para 5.16.

¹⁶⁹ (n 20) para 8.33.

¹⁷⁰ Hansard, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, 3 September 2014 (Vic), Mr Morris (Mornington) 3135.

The homicide offence recommended by the commission

As previously noted, there are significant issues with limiting an offence of this nature to a particular class of individuals. If an individual, in fear and desperation, kills an abuser, the rationale that there was no familial link between the individual and the perpetrator should not justify the exclusion of a separate defence/offence. Including dependents within the category of family members could ameliorate this issue, but it does not avert the problem that those in family violence type situations will potentially be left bereft of options in potentially analogous situations.

The Issues Paper suggests that the defendant must be a victim of family violence in order to engage the new offence. It is unclear whether the victim will include those who witness family violence. It is clear that children are victims of familial violence, even in cases where they are not the direct targets of the abuse. It is important that any separate homicide offence is not interpreted in such a way that it would preclude children, parents or potentially other family members who act to protect one another.

CHAPTER 9: OTHER OPTIONS FOR REFORM

Question 18: *Do you think there should be any changes to sentencing law (for example, the introduction of further mitigating factors, or guidance on displacement of the threshold in section 102 of the Sentencing Act 2002) to better provide for victims of family violence who commit homicide?*

It is clear that the law on sentencing in New Zealand needs to be developed, particularly in relation to cases involving family violence. The restrictive sentencing regime operating in New Zealand means that a murder conviction automatically attracts a life sentence, unless the nature of the offence and the circumstances of the defendant would render such a sentence ‘manifestly unjust’.¹⁷¹ The minimum non-parole period on a life sentence for murder may

¹⁷¹ Sentencing Act 2002, section 102 (1). See, generally, *O’Brien* (2003) CRNZ 572 [19].

not be less than 10 years or 17 years in the ‘most serious cases’.¹⁷² It is only in ‘limited circumstances when a finite sentence may be imposed’.¹⁷³ In all cases, only ‘exceptional’ circumstances will result in the presumption of life imprisonment being overturned. This threshold is too high, and should be amended or, alternatively abolished in favour of sentencing guidelines and trial judge discretion.

The introduction of further mitigating factors to section 9 of the Sentencing Act 2002 to cover familial violence would be welcomed. These changes should be complemented by new sentencing guidelines. The New Zealand Law Commission previously recommended that new guidelines should be drafted to ensure that ‘full and fair account’ may be taken of provocative conduct and other mitigating factors during sentencing.¹⁷⁴ These recommendations were not advanced, and it is appropriate that the need for adequate sentencing guidelines in cases involving familial violence is reiterated here.

Question 19: *Do you consider the Prosecution Guidelines should include specific guidance on charging and/or plea discussions where family violence against a defendant accused of committing homicide is in issue?*

It is recognised that overcharging and plea bargaining practices can be problematic in cases involving familial abuse. A general lack of awareness regarding the nature of familial violence may result in overcharging. The primary victim may enter into a plea bargain in fear that a self-defence claim might be rejected at trial, or alternatively to protect other family members (particularly children) from the ordeal of a criminal trial.¹⁷⁵ For these reasons, *inter alia*, the recommendation to include specific guidance regarding charging and/or plea

¹⁷² Hamidzadeh (n 35) [5].

¹⁷³ *ibid* [4].

¹⁷⁴ New Zealand Law Commission, *The Partial Defence of Provocation* (NZLC No 98 2007) paras 2.04 and 2.08.

¹⁷⁵ See, generally, Asher Flynn and Kate Fitz-Gibbon, ‘Bargaining with Defensive Homicide: Examining Victoria’s Secretive Plea Bargaining System Post-Law Reform’ (2011) 35 Melbourne University Law Review 905. See also, Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan, 2014); and, Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge, 2013).

discussions where family violence against a defendant accused of committing homicide is in issue is a welcome one.

Question 20: *Would you support further education or training on the dynamics of family violence for those operating within the criminal justice system, including lawyers, judges, police and jurors?*

A significant problem in cases involving familial violence relates to common misunderstandings and traditional stereotypes. Any amendments to the current legislation, the introduction of bespoke jury directions and specific guidelines pertaining to the admissibility of social framework evidence alone are incapable of reversing some of the engrained beliefs individuals have regarding the nature of family violence. If reform is to be meaningful, it is essential that amendments are supported by a comprehensive training package designed to assist those within the criminal justice system in understanding the nature and impact of familial violence, in addition to the import, interpretation and applicability of the new provisions.¹⁷⁶

¹⁷⁶ See Danielle Tyson, Debbie Kirkwood, and Mandy McKenzie (n 56) for a compelling analysis as to the rationale for the introduction of a comprehensive education package.

Appendix G

- (a) Ethical approval confirmation
- (b) *Prima facie* case
- (c) Co-authorship agreement documentation

From: [Sarah Agnew](#)
To: [Nicola Wake](#)
Subject: Ethical Approval - Vulnerable Offenders: Domestic and Comparative Perspectives
Date: 22 March 2016 14:39:23
Attachments: [image005.png](#)

Dear Nicola

Faculty of Business and Law Ethics Review

Title: Vulnerable Offenders: Domestic and Comparative Perspectives

I am pleased to confirm that following review of the above proposal, ethical approval has been granted on the basis of this proposal and subject to compliance with the University policies on ethics and consent and any other policies applicable to your individual research.

Please note that you must also notify this office of the following:

- Any significant changes to the study design;
- Any incidents which have an adverse effect on participants, researchers or study outcomes;
- Any suspension or abandonment of the study;

We wish you well in your research endeavours.

Kind regards
Sarah

Sarah Agnew

Research Administrator (Ethics), Research and Business Services

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E: sarah.agnew@northumbria.ac.uk

Follow Northumbria University's [Research Support Blog](#)

Room 106 Ellison Building, Northumbria University, Newcastle upon Tyne, NE1 8ST, United Kingdom



- (a) *Working title*: 'Domestic and Comparative Perspectives on Mental Condition Defences'
- (b) *Summary (300 words max)*: This published work focuses on the operation and application of mental condition defences within the criminal justice system. The matters with which these articles are concerned are important and timely, with the law relating to mental disorder and criminal justice in a state of flux across England and Wales, New Zealand, Australia and America. The articles offer an important and original comparative analysis of the law pertaining to the partial defences to murder, insanity, automatism, self-defence and intoxication across the aforementioned jurisdictions. Read together, these contributions form a coherent whole, connected by the overarching theme. To this end, there are cross-references between the articles/chapters where appropriate. Not only are these contributions linked by an overarching theme, but they each offer valuable insight into the way in which the law might be reformed based upon an analysis of the law within comparable jurisdictions. In this respect, each contribution advances innovative recommendations as to how the law should be interpreted and how it could be enhanced. Publications (v), (vi), (vii), and (xi) were submitted as part of UoA 20 under REF 2014. Chapter (viii) was submitted under the same exercise by the joint author. The average result for law was 2.48*. Articles (i)-(iv) will form part of a selection of REF 2020 publications. In terms of impact, the published works will form the basis of a REF 2020 impact case study on 'Mental Disorder and Criminal Justice'. The work has been cited extensively in academic texts at both national and international level. In particular, article (v) features on the Australian Government, Institute of Criminology website, and the Queensland Supreme Court website. The Law Commission for England and Wales has also cited the research underpinning these articles extensively.
- (c) *List of published work on which the application is based*:
- (i) Nicola Wake, 'His home is his castle. And mine is a cage': A new partial defence for primary victims who kill' [2015] Northern Ireland Legal Quarterly 66(2) 149-175.
 - (ii) Nicola Wake, 'Anglo-Antipodean Perspectives on the Positive Restriction Model and Abolition of the Provocation Defence' in Ben Livings, Alan Reed and Nicola Wake (eds) *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholars Publishing, 2015), 364-404. ISBN (10): 1-4438-7161-3; ISBN (13): 978-1-4438-7161-7.
 - (iii) Arlie Loughnan and Nicola Wake, 'Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication' (2014) in Alan Reed and Michael Bohlander with Nicola Wake and Emma Smith (eds) *General Defences: Domestic and Comparative Perspectives* (Ashgate Publishing, 2015) ISBN: 9781472433350.**

- (iv) Alan Reed and Nicola Wake, 'Potentiate Liability and Preventing Fault Attribution: The Intoxicated "Offender" and Anglo-American Dépeçage Standardisations' (2014) 47(1) John Marshall Law Review, Chicago, 57-114. ISSN: 0270-854X.**
- (v) Nicola Wake, 'Political Rhetoric or Principled Reform of Loss of Control? Anglo-Australian Perspectives on the Exclusionary Conduct Model' (2013) Journal of Criminal Law 77(6) 512-520. ISSN 1740-5580.
- (vi) Nicola Wake, 'Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives' (2013) Journal of Criminal Law 77(5) 433-457. ISSN 1740-5580.
- (vii) Nicola Wake, 'Recognising Acute Intoxication as Diminished Responsibility? A Comparative Analysis' (2012) Journal of Criminal Law 76(1) 71-98. ISSN: 0022-0183).
- (viii) Alan Reed and Nicola Wake, 'Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes' in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives on the Coroners and Justice Act 2009* (Ashgate Publishing, 2011) 115-134. ISBN: 978-1-4094-3175-6.**
- (ix) Alan Reed and Nicola Wake, 'Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed and Something New' in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives on the Coroners and Justice Act 2009* (Ashgate Publishing, 2011) 183-206. ISBN: 978-1-4094-3175-6.**

** Contribution as joint author.

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Nicola Wake

Name of co-author: Arlie Loughnan

Full bibliographical details of the publication *(including authors)*:

Arlie Loughnan and Nicola Wake, 'Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication' (2014) in Alan Reed and Michael Bohlander with Nicola Wake and Emma Smith (eds) *General Defences: Domestic and Comparative Perspectives* (Ashgate Publishing, 2015) ISBN: 9781472433350.

Section B

DECLARATION BY CANDIDATE *(delete as appropriate)*

I declare that my contribution to the above publication was as:

- (i) principal author
- (ii) joint author
- (iii) minor contributing author

My specific contribution to the publication was *(maximum 50 words)*:

Both authors shared research, and were involved in all aspects of the final piece.

Signed: .....(candidate) 29/03/2016.....(date)

Section C

STATEMENT BY CO-AUTHOR *(delete as appropriate)*

Either (i) I agree with the above declaration by the candidate
or (ii) ~~I do not agree with the above declaration by the candidate for the following reason(s):~~

Signed: .....(co-author) 30.3.16.....(date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Nicola Wake

Name of co-author: Alan Reed

Full bibliographical details of the publication (including authors):

Alan Reed and Nicola Wake, 'Potentiate Liability and Preventing Fault Attribution: The Intoxicated "Offender" and Anglo-American Dépeçage Standardisations' (2014) 47(1) John Marshall Law Review, Chicago, 57-114. ISSN: 0270-854X.

Section B

DECLARATION BY CANDIDATE (delete as appropriate)

I declare that my contribution to the above publication was as:

- (i) principal author
- (ii) joint author
- (iii) minor contributing author

My specific contribution to the publication was (maximum 50 words):

Parts IV, V and VI. Contribution was also made to the introduction and conclusion linked to those sections. Both authors reviewed all text and shared research throughout the process.

Signed: (candidate) 29/03/2016..... (date)

Section C

STATEMENT BY CO-AUTHOR (delete as appropriate)

- Either (i) I agree with the above declaration by the candidate
or (ii) I do not agree with the above declaration by the candidate for the following reason(s):

Signed: A. Reed. (co-author) 29/3/2016. (date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Nicola Wake

Name of co-author: Alan Reed

Full bibliographical details of the publication (including authors):

Alan Reed and Nicola Wake, 'Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed and Something New' in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives on the Coroners and Justice Act 2009* (Ashgate Publishing, 2011) 183-206. ISBN: 978-1-4094-3175-6.

Section B

DECLARATION BY CANDIDATE (delete as appropriate)

I declare that my contribution to the above publication was as:

- (i) principal author
- (ii) joint author
- (iii) minor contributing author

My specific contribution to the publication was (maximum 50 words):

The following sections: 'Section 2 of the Homicide Act 1957-Something Old'; Coroners and Justice Act 2009, section 52-Something New'; 'Extreme Mental or Emotional Disturbance-Something Borrowed'. Both authors shared research and had input into all aspects of the text.

Signed: .....(candidate) 29/03/2016.....(date)

Section C

STATEMENT BY CO-AUTHOR (delete as appropriate)

- Either** (i) I agree with the above declaration by the candidate
- or** (ii) I do not agree with the above declaration by the candidate for the following reason(s):

Signed: .....(co-author) 29/3/2016.....(date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Nicola Wake

Name of co-author: Alan Reed

Full bibliographical details of the publication (including authors):

Alan Reed and Nicola Wake, 'Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes' in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives on the Coroners and Justice Act 2009* (Ashgate Publishing, 2011) 115-134. ISBN: 978-1-4094-3175-6.

Section B

DECLARATION BY CANDIDATE (delete as appropriate)

I declare that my contribution to the above publication was as:

- (i) principal author
- (ii) joint author
- (iii) minor contributing author

My specific contribution to the publication was (maximum 50 words):

Significant underpinning research, particularly in relation to Hansard and Parliamentary material. Commentary on the history/development of provocation defence. Both authors shared research and had input into all aspects of the text.

Signed: .....(candidate) 29/03/2016.....(date)

Section C

STATEMENT BY CO-AUTHOR (delete as appropriate)

Either

☒ (i)

I agree with the above declaration by the candidate

or

☐ (ii)

I do not agree with the above declaration by the candidate for the following reason(s):

Signed: .....(co-author) 29/3/2016.....(date)